TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 27

HEGEMAN FARMS CORPORATION, APPELLANT,

vs.

CHARLES H. BALDWIN, THOMAS PARRAN, JR., AND KENNETH F. FEE, AS MEMBERS OF THE MILK CONTROL BOARD OF THE STATE OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED APRIL 25, 1934

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. E. 77—180

HEGEMAN FARMS CORPORATION, Plaintiff,

against

CHARLES H. BALDWIN, THOMAS PARRAN, JR., and KENNETH F. FEE, as Members of the Milk Control Board of the State of New York, Defendants

ORDER TO SHOW CAUSE

Upon reading the bill of complaint on file in the above entitled action, together with the affidavit of Benjamin Greenberg, and the motion of Rubinton & Coleman, solicitors for the complainant, for an order requiring the above named defendants, Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee as members of the Milk Control Board of the State of New York, to show cause, if any they have, why they should not be enjoined and restrained during the pendency of this action and until the determination thereof from in any manner proceeding with the enforcement against complainant of the provisions of a certain statute known as Chapter 158 of the laws of 1933 of the laws of the State of New York, and from enforcing against complainant any orders made by defendants pursuant to the aforesaid statute; and that the complainant may have such other and further relief as to the court may seem just and equitable in the premises.

And it further appearing from the verified bill of complaint filed herein and the affidavit of Benjamin Greenberg, sworn to on the 26th day of January, 1934, that this is a proceeding to restrain the above named defendants, officers [fol. 4] of the State of New York, acting pursuant to the provisions of the aforesaid statute, Chapter 158 of the laws of 1933 of the laws of the State of New York in the enforcement and execution of such statute as against this complainant, and a temporary and interlocutory injunction being prayed for herein, and this motion being filed pur-

suant to the provisions of Secs. 380, 381, title 28, United States Code (Judicial Code Section 266, amended) for the issuance of a temporary restraining order upon the grounds set forth in the bill of complaint and affidavit of Benjamin Greenberg to prevent immediate, great and irreparable injury, loss and damage which would otherwise result to the complainant before the hearing and determination of the application for an interlocutory injunction herein may be had, or notice thereof be served, particularly because said complainant has been required by defendants to forfeit its license as milk dealer, or else to pay $23,000.00 before January 31, 1934, which $23,000.00 will be distributed by defendants to 450 milk producers, and said complainant further making this its application to this court for a hearing of this cause for an interlocutory injunction in accordance with Section 380, title 28 of the United States Code (Judicial Code Section 266, amended) before three judges, as provided in said Section 380, title 28, United States Code (Judicial Code Section 266, amended),

Now, therefore, the court being fully advised, it is

Ordered and adjudged, that the said defendants, be and appear before the court consisting of three judges as provided by Section 380, title 28, United States Code (Judicial Code Section 266, amended), on the 12th day of February, 1934, at the hour of 10:30 A. M. of the said day, or as soon [fol. 5] thereafter as counsel can be heard, then and there to show cause, if any they have, why a temporary injunction should not be issued by this court as prayed for in the bill of complaint, and affidavit herewith, enjoining and restraining the defendants, Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee as members of the Milk Control Board of the State of New York, and each of them from proceeding in any manner to enforce the aforesaid statute, Chapter 158 of the laws of 1933 of the laws of the State of New York, or any of the orders made by defendants pursuant to said statute, as against complainant, and it further appearing that the defendants have made an order forfeiting the license of complainant as a milk dealer, unless complainant pay over to defendants the sum of $23,000.00 before January 31, 1934, which said sum will be distributed by defendants to 450 milk producers,

And it appearing from the verified complaint on file herein and the court being of the opinion that irreparable

loss and damage will result to complainant unless a temporary restraining order is granted herein before notice can be served and a hearing had thereon; this restraining order is therefore granted without notice under the provisions of Sections 380, 381, title 28, United States Code (Judicial Code Section 266, amended), now, therefore, it is

Ordered, that the defendants and each of them, individually or as members of the Milk Control Board of the State of New York, be and they hereby are restrained until the 12th day of February, 1934, and until the hearing and determination of the application of the complainant for its interlocutory injunction herein by three judges as provided by statute, from in any manner proceeding with the [fol. 6] enforcement of said statute, Chapter 158 of the laws of 1933 of the laws of the State of New York, or of any orders made by defendants pursuant to said statute, as against complainant, and it is further

Ordered, that the complainant file a bond conditioned as required by law in the sum of $1,000.00 for the payment of all damages which may accrue by virtue of the issuance of the restraining order; and it is further

Ordered by the court that this order shall be in full force, obligatory and binding upon the said defendants and each of them and all persons acting by, through or under them, upon service of a copy thereof upon them, or their solicitor or solicitors of record in this cause; and sufficient cause appearing

Let a copy of the affidavit of Benjamin Greenberg and of the bill of complaint in the above cause, and a copy of this order and a subpœna in the said cause be served upon Honorable Herbert H. Lehman, Governor of the State of New York, and upon Honorable John J. Bennett, Jr., Attorney General of the State of New York.

This order, signed at New York, on the 30th day of January, 1934, at 4:30 o'clock P. M.

Wm. Bondy, United States District Court Judge for the Southern District of New York.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

Hegeman Farms Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the Borough of Queens, City and State of New York, and being a resident of the Eastern District of New York, brings this, its bill of complaint against Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee as members of the Milk Control Board of the State of New York, and shows unto your Honors as follows:

First. Plaintiff suing on behalf of itself and all others similarly situated brings this bill of complaint against defendants as members of the Milk Control Board of the State of New York.

Second. The value of the matter in dispute herein is in excess of the sum of Three thousand ($3,000.00) Dollars exclusive of interest and costs.

Second-A. Defendants Thomas Parran, Jr. and Kenneth F. Fee maintain an office for the regular conduct of this business in the Borough of Manhattan, New York City, in the Southern District of New York.

Third. This action is a suit in equity and arises under the Constitution and Laws of the United States as will [fol. 8] hereinafter more particularly appear. Among other things this suit is brought to prevent the deprivation under color of a certain statute of the State of New York, of certain rights and immunities secured to plaintiff by the Constitution of the United States, that is, a right to have and enjoy its property without being deprived thereof without due process of law, and without being denied the equal protection of the law, and a right to enjoy its liberty without being deprived thereof without due process of law and without being denied the equal protection of the law,

and this suit among other things, involves the question as to whether or not plaintiff may purchase and offer to purchase milk and dairy products from milk producers and others at such prices as plaintiff is willing to offer and at such prices as milk producers and others are willing to sell, and whether plaintiff may sell and offer for sale milk and milk products owned by it at such prices as it desires, and whether said statute preventing plaintiff from purchasing and offering to purchase milk and dairy products from milk producers and others at such prices as plaintiff is willing to pay and such milk producers and others are willing to sell, and preventing plaintiff from selling and offering for sale milk and milk products at such prices as it desires, is not contrary to the Constitution of the United States, and whether defendants in threatening to enforce the provisions of the said statute against the plaintiff, its officers and agents, are not depriving plaintiff of its property and its right to engage in business without due process of law, and whether they are not denying plaintiff the equal protection of the law.

This suit is brought to prevent defendants from proceed- [fol. 9] ing under and by virtue of the provisions of the Statute of the State of New York, hereinafter referred to, from illegally and unlawfully threatening plaintiff with the revocation of plaintiff's license to carry on the business of a milk dealer and from inflicting upon plaintiff monetary penalties under color of said Statute.

Fourth. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Plaintiff is engaged in the purchase and sale of milk and milk products in the City and State of New York. The said business is a lawful one and the pursuit thereof cannot be prohibited directly or indirectly.

Fifth. Plaintiff is the owner of valuable properties consisting of realty and the improvements thereon at Kortright Station, Bloomville, N. Y., Sheds Corners, Sheds, N. Y., Maybury Mills, McGraw, N. Y. and Youngs Crossing, Truxton, N. Y., which four properties are owned free and clear of mortgages, and the fair present value of which is upwards of One hundred fifty thousand ($150,000.00) Dollars. Plaintiff is also the owner of two sites and the

improvements thereon in the Borough of Queens, City and State of New York, which improvements are respectively a distributing station and a pasturizing and bottling plant. The fair present value of plaintiff's equity in the said New York City properties is respectively One hundred fifty thousand ($150,000.00) Dollars and Ninety thousand ($90,000.00) Dollars. All of the improvements on the aforesaid properties are especially adapted for the carrying on of the milk business. Plaintiff is also the owner of a fleet of [fol. 10] delivery trucks and a large amount of equipment used in the carrying on of its business, and the fair present value of said trucks and equipment is upwards of Sixty thousand ($60,000.00) Dollars.

Plaintiff corporation was organized in 1921 and during the past five years it has sold an average of $750,000.00 a year, and the present fair value of the plaintiff's good will is upwards of One hundred thousand ($100,000.00) Dollars.

Sixth. In 1933 the Legislature of the State of New York by Chapter 158 of the 1933 Laws of the State of New York amended the Agriculture and Markets Law of the State of New York by adding thereto a new article to be Article 25. A copy of the said Statute, Chapter 158 is annexed hereto as Exhibit "A".

Seventh. On or about June 22, 1933, there was duly issued to plaintiff pursuant to said Chapter 158 of the 1933 Laws of the State of New York, a license to carry on the business as a milk dealer, a copy of which license is annexed hereto as Exhibit "B". Plaintiff is also duly licensed in accordance with the Ordinances of the City of New York, to carry on the business of a milk dealer, and a copy of the said license is annexed hereto as Exhibit "C".

Eighth. Under the aforesaid statute defendants are empowered to fix by order the maximum and minimum wholesale and retail prices to be charged and paid for milk handled within the State of New York for fluid consumption, and in the event that plaintiff offer to purchase or purchase or offer to sell or sell fluid milk at prices less than or more than the price fixed by defendants, the defendants are empowered to suspend or revoke the plaintiff's license to carry on the business of milk dealer.

[fol. 11] Ninth. Defendants claim that in the past plaintiff has purchased milk at prices less than that fixed by

defendants, in accord with said statute, and defendants by orders dated December 29, 1933, and December 30, 1933, copies of which are annexed hereto as Exhibits "D" and "E", have threatened to revoke plaintiff's aforesaid license received by it from the State of New York, which permits it to carry on the business of milk dealer, unless plaintiff pay to the milk producers which sold milk to plaintiff during May, June, July, August and September of 1933, an amount specified in the order of defendants dated December 30, 1933, for each one hundred (100) pounds of milk purchased by plaintiff during said period. The total amount which plaintiff would be required to pay under such order is upon information and belief upwards of Twenty-three thousand and 00/100 ($23,000.00) Dollars, and upon information and belief in the event that defendants are acting without legal authority in ordering plaintiff to make such payments, plaintiff would be without remedy to recover back the payments thus ordered by defendants to be paid, or else a multiplicity of suits would be required to recover back such payments. Defendants, moreover, threaten to enforce the aforesaid Statute and all its terms against the plaintiff in the event that plaintiff offer to purchase or purchase or sell or offer to sell milk in fluid form at a price more or less than the price fixed by defendants, and in such event defendants will revoke the license received by plaintiff from the State of New York to carry on the business of milk dealer, a copy of which license is annexed hereto as Exhibit "B", and which revocation of said license will result in a forfeiture of said license and in a forfeiture of the license issued to plaintiff from the [fol. 12] City of New York, a copy of which is annexed hereto as Exhibit "C", and will further result in a destruction of a substantial part of the value of plaintiff's properties, since such properties are peculiarly adapted to the carrying on of the business of buying and selling milk, in which business plaintiff will be unable to engage without such licenses.

The aforesaid Statute is in its terms so drastic and the penalties attached to the violation of its terms so great that plaintiff may not with safety refuse to comply with the aforesaid orders of defendants dated December 29, 1933, and December 30, 1933, and may not offer to purchase or purchase or offer to sell or sell fluid milk at prices

other than those fixed by the defendants even to test the constitutionality of the said Statute, and unless this Court shall determine the validity of the said Statute plaintiff will be compelled to submit to the said Statute whether the same be valid of invalid, and will be compelled to submit to defendants' threats and will be deprived of its property and liberty without due process of law, and will be denied the equal protection of the law, in contravention of the 14th Amendment of the Constitution of the United States, and plaintiff has no adequate remedy at law and may obtain relief only in a Court of Equity.

Tenth. The aforesaid Statute, Chapter 158 of the 1933 Laws of the State of New York, is unconstitutional and void under the 14th Amendment of the Constitution of the United States in that it deprives plaintiff of its liberty and property without due process of law and of the equal protection of the law, and if plaintiff is not permitted to offer to purchase and purchase fluid milk at such prices [fol. 13] as the plaintiff is willing to pay therefor, and the vendors thereof willing to sell the same, and to sell fluid milk at such prices as it desires, it will suffer great and irreparable loss for which there is no adequate remedy at law, and for which relief can be obtained only in a Court of Equity.

For a Second Cause of Action

Eleventh. Repeats and realleges as if fully set forth each and every allegation contained in paragraphs "First" to "Ninth" inclusive.

Twelfth. The aforesaid statute, Chapter 158 of the Laws of 1933 of the State of New York, provides that the business of producing, transporting, distributing and selling milk in the State of New York, is a business affected with a public interest.

Thirteenth. Defendants acting under the authority conferred upon them by the aforesaid statute fixed One and 86/100 ($1.86) Dollars per one hundred (100) pounds for milk containing three and five-tenths (3.5) butter fat plus an additional four ($.04) cents per hundred pounds for each additional one-tenth of one percentum (1/10 of 1%) of butter fat content as the price which plaintiff must pay

for milk after May 16, 1933, in the event that such milk was ultimately to be used for consumption as fluid milk, and One and 30/100 ($1.30) Dollars per one hundred (100) pounds in the event that the milk was ultimately to be used for consumption as fluid cream, which purposes namely, sale for consumption as fluid milk or as fluid cream were and are the purposes for which plaintiff purchased and purchases milk, the said prices so fixed by defendants being applicable in the event that such milk was purchased in the territory in which plaintiff made and makes it- milk pur-
[fol. 14] chases, which territory is customarily known *a* in the milk industry as the 200-210 mile zone, that being the distance of such territory from the City of New York.

Fourteenth. The said prices so fixed by defendants for milk purchased to be sold for the purposes of consumption as fluid milk and fluid cream remained in effect until July 21, 1933, upon which date the price to be paid for milk to be ultimately utilized for consumption as fluid milk in the said 200-210 mile zone, was fixed at Two and 23/100 ($2.23) Dollars per one hundred (100) pounds, plus a seven and one-half ($.07½) cent charge to be paid to plaintiff's vendors, which charge was designated by defendants as a freight differential, plus four ($.04) cents for each additional one-tenth of one percentum (1/10 of 1%) of butter fat content of such milk over and above a butter fat content of three and five-tenths (3.5) of butter fat content, and upon said July 21, 1933, the price to be paid by the plaintiff to its vendors in the said 200-210 mile zone for milk ultimately to be sold for the purpose of consumption as fluid cream was fixed at One and 55/100 ($1.55) Dollars per one hundred (100) pounds. The said *price* prices so fixed by defendants on July 21st have at all times since that date remained and still are in full force and effect according to the orders issued by defendants pursuant to the aforesaid statute.

Fifteenth. Defendants acting under the aforesaid statute fixed eight ($.08) cents per quart as the price for which milk of the grade known as "Grade B" milk could be sold in the City of New York at wholesale after May 16, 1933. The said "Grade B" milk is the grade of milk which at all times herein mentioned has been sold by plaintiff, and the City of New York is the territory in which plaintiff made and makes its sales.

[fol. 15] Sixteenth. The said price of eight ($.08) cents so fixed by defendants remained in effect until July 21, 1933, when by order of defendants made pursuant to the aforesaid statute, the said wholesale price of said milk in the City of New York was fixed at nine ($.09) cents per quart in the City of New York, and said price of nine ($.09) cents at all times since has been and is the price which remains in force under the orders made by the defendants under the aforesaid statute.

Seventeenth. Defendants acting under the said statute fixed as the wholesale prices at which fluid cream could be sold within the City of New York, after May 16, 1933, twenty-seven ($.27) cents, thirty-nine ($.39) cents and forty-five ($.45) cents, per quart, the variance in the said prices so fixed by the board being dependent upon differences in the butter fat content of said fluid cream.

Eighteenth. The said prices so fixed by the board for fluid cream remained in full force and effect until July 21, 1933, when the prices for such fluid cream were fixed by the board at thirty-one ($.31) cents, Forty-four ($.44) cents and fifty-three ($.53) cents dependent upon the butter fat content of such fluid cream, and the said prices so fixed on July 21, 1933 have at all times — and remain and still are in full force and effect under the orders of the defendants made pursuant to the aforesaid statute.

Nineteenth. The aforesaid prices fixed by defendants as the prices at which "Grade B" milk and fluid cream could be sold at wholesale in the City of New York, were designated in the orders of defendants as minimum prices but *[fol. 16] in practical effect and for all purposes such prices* so fixed by defendants likewise fixed the maximum price at which plaintiff could sell milk and cream since the competition offered by other milk dealers in the City of New York prevented and prevents plaintiff from selling milk or cream at prices higher than those fixed by defendants in their orders.

Twentieth. The difference between the prices thus fixed by defendants as the prices which plaintiff must pay for milk purchased by it and the prices at which such milk could be sold whether in the form of "Grade B" milk or fluid cream, has at all times been and now is insufficient in

amount to afford to plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation, and the said prices thus fixed were and are such as to confiscate plaintiff's property without due process of law and to deprive plaintiff of the equal protection of the law, and the said prices thus fixed by defendants and the said orders thus made by defendants violated and violate plaintiff's rights to due process of law and to the equal protection of the law under the 14th amendment of the Federal Constitution.

Twenty-first. The aforementioned orders of defendants annexed hereto as Exhibits "D" and "E" and providing for the revocation of plaintiff's license as a milk dealer unless it pay over to defendants the sums called for by said orders, are based upon the aforesaid confiscatory price and confiscatory orders fixed and made by defendants, and defendants' attempt to enforce the prices so fixed by it by enforcing against plaintiff their said orders, copies of which are annexed hereto as Exhibits "D" and "E", and defendants' threat to enforce the aforesaid statute and all of its penalties against plaintiff and to revoke plaintiff's [fol. 17] license as a milk dealer unless plaintiff purchase and sell its milk at the prices fixed by defendants, violates plaintiff's right to due process of law and to the equal protection of the law as guaranteed to plaintiff by the 14th amendment to the Federal Constitution.

Wherefore, plaintiff prays:

That defendants as the Milk Control Board of the State of New York, be enjoined and restrained by preliminary and permanent order and injunction from enforcing against plaintiff the said Statute, Chapter 158 of the 1933 Laws of the State of New York, and the aforesaid orders made by defendants, namely, the orders fixing the prices at which plaintiff may purchase and sell milk, and the orders annexed hereto as Exhibits "D" and "E", and that an order to show cause issue hereunder upon the application of plaintiff to defendants requiring them to show cause why a temporary injunction should not issue as prayed for herein; that the aforesaid statute Chapter 158 of the 1933 Laws of the State of New York be declared unconstitutional, illegal and void, and that the aforesaid orders of defendants fixing the prices at which plaintiff may purchase and sell

milk be declared confiscatory of plaintiff's property, unconstitutional, illegal and void, and

That a writ of subpœna may issue to defendants as the Milk Control Board of the State of New York, requiring them to answer this bill of complaint fully and truthfully but not on oath, an oath being hereby waived, and that such further relief be granted as the nature of plaintiff's case may require or to Equity may seem just and proper.

Rubinton & Coleman, Solicitors for Plaintiff.

[fol. 18] *Duly sworn to by Benjamin Greenberg. Jurat omitted in printing.*

[fol. 19] EXHIBIT "B" TO BILL OF COMPLAINT

License No. 2268. Code: D-D, C, S. Class: —.

State of New York

(Seal)

Department of Agriculture and Markets

Milk Control Board

Hegeman Farms Corporation (Name of Licensee), of 1624 Centre Avenue, Ridgewood, L. I., N. Y. (Address), is hereby licensed as a milk dealer, pursuant to the provisions of Article 25 of the Agriculture and Markets Law (Chapter 158 of the Laws of 1933) to buy milk from producers at the place or places named in the licensee's application, to buy milk from others and to sell or distribute milk in the market or markets named in the licensee's application; provided that no milk as defined in Article 25, shall be purchased from or sold to an unlicensed milk dealer, and no milk as so defined shall be dealt in or handled if the licensee has reason to believe that it has been dealt in or handled in violation of Article 25; and provided further that the licensee shall return for producers the benefits of any increase of prices received by virtue of the minimum price provisions of Section 312 of the Agriculture and Markets Law.

This license is valid until March 31, 1934, unless sooner revoked.

Dated at Albany, N. Y., June 22, 1933.

Milk Control Board, Kenneth F. Fee, Director.

$250.00.

[fol. 20] EXHIBIT "D" TO BILL OF COMPLAINT

State of New York, Department of Agriculture and Markets

Milk Control Board

In the Matter of the Proposed Revocation of the License Heretofore Issued to Hegeman Farms Corporation Pursuant to the Provisions of Article 25 of the Agriculture and Markets Law

Official Order

Hegeman Farms Corporation having applied to the Milk Control Board for a license under Article 25 of the Agriculture and Markets Law, and such license having been issued, and notice having been given to Hegeman Farms Corporation of the time and place of a hearing with respect to the proposed revocation of such license, and such hearing having been had, and the licensee having appeared, and evidence having been received, and due deliberation having been had;

It is hereby ordered that License No. 2268 issued to Hegeman Farms Corporation under date of June 22, 1933, be and the same hereby is revoked.

This revocation becomes effective January 31, 1934 at 6:00 P. M.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee. (Seal of Milk Control Board, State of New York.)

Dated Albany, N. Y., December 29, 1933.

[fol. 21] EXHIBIT "E" TO BILL OF COMPLAINT

State of New York, Department of Agriculture and Markets

Milk Control Board

In the Matter of the Proposed Revocation of the License Heretofore Issued to Hegeman Farms Corporation, Pursuant to the Provisions of Article 25 of the Agriculture and Markets Law

Official Order

Whereas on the 29th day of December, 1933, the license heretofore issued to Hegeman Farms Corporation pursuant to Article 25 of the Agriculture and Markets Law was ordered revoked effective at 6:00 P. M. on January 31, 1934;

It is hereby ordered that if the said Hegeman Farms Corporation shall pay to each and every producer who has delivered milk to any of the plants operated by the said Hegeman Farms Corporation in the State of New York a sum which will bring the total payment to each such producer for all of the milk delivered during the months of May, June, July, August and September up to the minimum payments as required by the official orders of the Milk Control Board, and if the said Hegeman Farms Corporation shall furnish to the Milk Control Board on or before January 29, 1934 satisfactory evidence showing that such payments have been made, then and in that event the order of the Board revoking the license of the said Hegeman Farms Corporation shall be suspended so long as the said Hegeman Farms Corporation shall comply with all of the official orders of the Board, including orders relating to the minimum prices to be paid by milk dealers to producers.

The additional payments to be made to producers as indicated above shall be for not less than the amounts per hundred pounds of milk delivered to each of the several plants for the respective months as indicated in the following table.

Period	Maybury	Youngs Crossing	Kortright	Sheds
May 16–31	$.0325	$.16	$	$.093
June	.202	.215	.184	.110
July 1–20	.2731	.2736	.2406	.2684
July 21–31	.421	.432	.387	.419
August	.079	.184	.109	.185
September	.1855	.2762	.2085	.2887

Milk Control Board, (S.) Charles H. Baldwin, for Thomas Parran, Jr.; (S.) Kenneth F. Fee. (Seal.)

Dated Albany, N. Y., December 30, 1933.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BENJAMIN GREENBERG

STATE OF NEW YORK,
County of Kings, ss:

Benjamin Greenberg being sworn, says: I am the President of Hegeman Farms Corporation, the plaintiff herein, and I submit this affidavit in support of the application made by plaintiff for a temporary injunction pending the final determination of the action, restraining defendants from enforcing against plaintiff the statute known as Chapter 158 of the Laws of 1933 of the State of New York, a copy of which is annexed in full to the complaint.

The plaintiff is engaged in the sale of milk at wholesale in the City of New York, and its business was established in 1921. Plaintiff has continuously operated as a wholesale distributor of milk in New York City since that time.

Plaintiff is the owner of valuable properties which it uses in connection with its business and which are located at Kortright Station, Bloomville, N. Y., Sheds Corners, Sheds, N. Y., Maybury Mills, McGraw, N. Y., and Youngs Crossing, Truxton, N. Y. These properties consist of realty and the improvements thereon and are utilized by plaintiff in [fol. 23] connection with the receipt of milk purchased by it from upstate producers. The four properties to which I have referred are owned by plaintiff free and clear of all mortgages, and the present reasonable value of these four

properties is approximately $150,000.00. Plaintiff also owns a distributing station and a pasturizing and bottling plant, which two properties are located in the Borough of Queens, New York City. The value of the plaintiff's equities in its two New York City properties is respectively $150,000.00 and $90,000.00. The value which I have given for these properties represents the present value of the land plus the present reasonable cost of constructing the improvements which have been placed upon the land less the depreciation which has taken place in the improvements. All of the properties owned by plaintiff are such as to be peculiarly adapted by reason of the improvements thereon, to the carrying on of the wholesale milk business. Plaintiff also owns a fleet of delivery trucks and a large amount of equipment which is necessary to the carrying on of its wholesale milk business, and the present reasonable value of such trucks and equipment is about $60,000.00. This value represents the present cost of replacing the trucks and equipment less the depreciation that has taken place in such property.

The average annual amount of sales made by plaintiff during the past five years has been approximately $750,000.00. Plaintiff's present business and organization has been developed after many years of operation and its business today taken as a whole, has a substantial going value over and above the value of the physical assets to which I have referred.

The said milk business which plaintiff carries on is a [fol. 24] lawful one which consists of the purchase and sale of milk and the pursuit thereof cannot validly be prohibited either directly or indirectly.

The aforesaid statute of the State of New York, Chapter 158 of the Laws of 1933, declares the milk industry to be affected with a public interest and creates a board known as the milk control board which is empowered to supervise and regulate the entire milk industry of the State of New York. Defendants are the present members of said board. Among other powers the board is authorized by the said statute to fix by order, the wholesale and retail minimum and maximum prices which may be paid and received for milk handled within the State of New York for fluid consumption.

The statute in this connection provides that it shall be unlawful to sell within the State of New York milk which has been produced without the state in the event that such milk has been purchased from the producer without the state at a price lower than that required to be paid for milk within the state. This provision of the statute affects a substantial part of the milk which is consumed within the State of New York, since at least twenty per cent of the milk consumed within the State of New York is produced in other states.

The defendants themselves, according to apparently authentic articles which have appeared in the current press, have recognized their inability to control the milk supply which thus comes into the State of New York from other states. Such articles appeared in The New York Times of January 3, 1934 and January 8, 1934. I annex copies of such articles hereto as Exhibits "I" and "II".

The defendants have threatened to enforce the aforesaid [fol. 25] statute, Chapter 158 of the New York Laws of 1933, against plaintiff, and defendants claim that in the past plaintiff has purchased milk at prices less than that fixed by defendants, which prices were fixed by defendants under the authority granted to them by the aforesaid statute.

Defendants have threatened to revoke the plaintiff's license to carry on the business of milk dealer, a copy of which license is annexed to the complaint, unless plaintiff pay to the producers who sold milk to plaintiff during the months of May to September inclusive, 1933, an amount which is specified in an order of the defendants dated December 30, 1933, for each one hundred pounds of milk purchased by plaintiff during the said period from May to September. A copy of the said order setting forth the amounts which plaintiff has been ordered to pay for each one hundred pounds of milk purchased by it during said period, or in the alternative to lose its license, is annexed to the complaint. The total amount which plaintiff would be compelled to pay under the said order of defendants would be upwards of $23,000.00, and this money will be turned over by defendants to the various producers who sold milk to plaintiff during the said period of May to September.

Should plaintiff pay to defendants the said $23,000.00 which payments defendants have imposed upon plaintiff as a condition of plaintiff retaining its license, and should the order of defendants be ultimately held invalid either by reason of the unconstitutionality of the statute under which defendants are acting or by reason of the invalidity of the order irrespective of the constitutionality of said statute, it is extremely doubtful whether plaintiff could recover back the monies so paid from the milk producers to whom the [fol. 26] money would be turned over by defendants. In any event a multiplicity of suits would be required to recover back the money after it had been turned over to the producers by defendants inasmuch as plaintiff during the period from May to September purchased its milk from approximately four hundred fifty producers, so that some four hundred fifty law suits would be necessitated. For this reason among others, plaintiff is asking that the defendants be stayed from the enforcement of the said orders of December 29th and December 30th, 1933, until the present application for a temporary injunction is determined.

Defendants furthermore threaten to enforce the aforesaid statute against plaintiff in the event that it offer to purchase or purchase or sell or offer to sell milk in fluid form at prices other than those fixed by defendants, and in such event defendants will revoke plaintiff's license to carry on the business of a milk dealer.

By reason of the aforesaid statute and its threatened enforcement against plaintiff by defendants, plaintiff is unable to deal in fluid milk at prices other than those fixed by defendants, even for the purpose of testing the constitutionality of the said statute, since the statute is in its terms so drastic and the penalties attached to the violation of its terms so great, that plaintiff may not with safety refuse to comply with the aforesaid orders of defendants, and could not safely deal in milk at prices other than those fixed by defendants.

The threatened enforcement of the statute by defendants will result in a forfeiture of the license received by plaintiff from the State of New York to carry on the business of milk dealer, and the revocation of the said State license will necessarily result in a forfeiture of the license [fol. 27] issued to plaintiff from the City of New York, copies of which licenses are annexed to the complaint, and

the forfeiture of such licenses will result in a destruction of the principal part of the value of plaintiff's properties which are such as to be peculiarly adapted to carrying on the business of buying and selling milk, which business plaintiff will be unable to pursue without such licenses.

The aforesaid statute, Chapter 158 of the Laws of 1933 of the State of New York, is, upon information and belief, unconstitutional and void under the 14th amendment of the Constitution of the United States in that it deprives plaintiff of its liberty and property without due process of law and of the equal protection of the laws.

The orders which defendants have made pursuant to the said statute, which orders fix the price which plaintiff must pay for milk purchased by it, and the price at which plaintiff may sell milk, are moreover, such that they do not afford plaintiff a fair return upon the present fair value of its properties less depreciation, which values I have previously set forth.

The orders therefore, irrespective of the constitutionality of the statute, are such as to confiscate plaintiff's property without due process of law and to deny plaintiff the equal protection of the law so that such orders are in any event unconstitutional, illegal and void.

All of plaintiff's sales consist of sales of fluid milk and of fluid cream. All of the purchases made by plaintiff are made within the territory known as the 200-210 mile zone, this being the distance of such territory from New York City. Defendants acting under the aforesaid statute, made an order which provided that on and after May 16th, no [fol. 28] milk should be purchased within the said 200-210 mile zone, which milk was to be sold for the purpose of consumption as fluid milk, unless the purchaser paid for such milk One and 88/100 ($1.88) Dollars per hundred pounds for milk containing three and five-tenths (3.5) of butter fat, plus an additional four ($.04) cents per hundred pounds for each additional one-tenth of one per centum (1/10 of 1%) of butter fat content. The defendants further ordered that on and after May 16th that the price to be paid in the said 200-210 mile zone for milk which was to be sold for fluid cream should be One and 30/100 ($1.30) Dollars per one hundred pounds.

These prices thus fixed by defendants as the purchase prices applicable to the milk purchased by plaintiff remained in effect until July 21st.

Upon July 21, 1933, by order of defendants which was made under the aforesaid statute, the price of milk in the said 200-210 mile zone was fixed at Two and 23/100 ($2.23) Dollars per one hundred (100) pounds plus four ($.04) cents per hundred pounds for each one-tenth of one per centum (1/10 of 1%) of butter fat, and plus an additional seven and one-half ($.07½) cents which defendants designated as a freight differential. Such price so fixed to go into effect on July 21, 1933, was applicable to milk which was being purchased for the purpose of resale as fluid milk, and defendants fixed One and 55/100 ($1.55) Dollars as the price within the said territory for milk which was being purchased for resale as liquid cream.

The prices so fixed by defendants on July 21st have ever since and now remain in force and effect.

Defendants acting under the aforesaid statute fixed eight [fol. 29] ($.08) cents a quart as the price for which "Grade B" milk could be sold at wholesale in the City of New York after May 16, 1933. Such "Grade B" milk is the grade which is sold by plaintiff. This price so fixed by defendants at which "Grade B" milk could be sold in New York City, remained in effect until July 21, 1933, when by order of defendants the price at which such milk could be sold in New York City was fixed at Nine ($.09) cents per quart, which is the price still in effect at the present time. Defendants by order made under the aforesaid statute, provided that on and after May 16th the prices at which fluid cream could be sold in the City of New York should be twenty-seven ($.27) cents, thirty-nine ($.39) cents and forty-five ($.45) cents. The prices so fixed varied according to the butter fat content of the cream; the higher the content the higher the price allowed. The three prices so fixed were applied respectively to the grades of cream known as light, medium and heavy cream.

The prices so fixed at which fluid cream could be sold remained in effect until July 21st, when defendants fixed as the prices at which fluid cream could be sold dependent upon the butter fat content, thirty-one ($.31) cents, forty-four ($.44) cents, and fifty-three ($.53) cents. The said prices are applicable respectively to the said grades known as light, medium and heavy cream. These prices so fixed on July 21, 1933 as the prices at which cream could be sold at wholesale in the City of New York ever since remained and now are in effect.

The prices to which I have referred and which defendants fixed as the prices at which "Grade B" milk and fluid cream could be sold in the City of New York, were designated in the orders made by defendants as being minimum [fol. 30] prices. In actual practice and for all purposes however, the prices fixed by defendants likewise fixed the maximum price at which plaintiff could sell the milk purchased by it. The reason for this is that very keen competition is presented in the wholesale milk business in New York City, and were plaintiff to attempt to charge more than the prices fixed by defendants in their orders, the result would be an immediate loss by plaintiff of practically all, if not all, of its trade, with a resultant immediate and almost complete destruction of the value of plaintiff's properties. It is possible that competing dealers might also in time be forced out of business, but this would not operate to restore to plaintiff the value of its properties since those properties are peculiarly adapted to the carrying on of the milk business, and the carrying on of that business depends in the City of New York, upon the continuous maint*ain*en-ce of the good will of the trade served by the milk dealer, so that any considerable interruption of service by the milk dealer would mean the practically complete loss of the dealer's good will.

The difference between the prices thus fixed by defendants as the prices which plaintiff must pay for the milk purchased by it and the prices which defendants fixed as the selling price of such milk has at all times been and now is insufficient in amount to afford to plaintiff a fair return on the present fair value of the properties devoted by plaintiff to its milk business less depreciation, which present fair value less depreciation as I have previously pointed out, is Four hundred fifty thousand ($450,000.00) Dollars plus the substantial going value of the business.

Indeed the difference between the prices so fixed by the board has not been sufficient to even cover the actual ex- [fol. 31] penses of operating the plaintiff's business let alone affording to plaintiff a fair return upon the value of its properties.

The figures which I am setting forth hereinafter represent the actual expense of my company in its operations since the enactment by the defendants of their orders fixing the purchase and selling price of milk. My company

sells practically all of the milk purchased by it for consumption as fluid milk. A very negligible amount, not more than about one per cent of the milk is sold as fluid cream. The figures which I am setting forth are calculated without taking into consideration the sales of fluid cream, since such sales are so trifling in amount as to have no effect on the calculation.

Defendants in fixing the purchase price of milk have fixed it at a certain amount for 100 pounds. In actual practice the milk is delivered by the purchasers to plaintiff and to other milk dealers in 40 quart cans, the contents of which weigh 85 pounds. It at all times has been and still is the custom of plaintiff as well as other milk dealers, to make their calculations on the basis of such 40 quart cans and to compute their operating costs upon that basis. For this reason I am using the 40 quart can containing 85 pounds of milk as the basis of the figures which I am setting forth.

(a) Cost of milk to plaintiff (after May 16th and to July 21, 1933). The milk purchased by plaintiff averaged and still averages 3.6% butter fat content. The price fixed by defendants from May 16th to July 21, 1933, was $1.88 per hundred pounds for 3.5% butter fat, plus $.04 a hundred pounds for each 1/10 of 1% of butter fat content. The [fol. 32] price of one hundred pounds of such 3.6% butter fat milk would be $1.92 and the cost of a can of milk containing 85 pounds if 85/100 of $1.92 or $1.632. (Since July 21, 1933.)

Defendants fixed $2.23 per hundred pounds for milk containing 3.5% butter fat plus $.04 for each 1/10 of 1% of butter fat content, and plus an additional $.07½ per hundred pounds designated as a freight differential. The price of a hundred pounds of milk containing 3.6 butter fat content being the grade of milk purchased by plaintiff, would be $2.345, and the price of a can containing 85 pounds would be 85/100 of that amount or $1.99325.

(b) Cost of handling milk at upstate creameries. Some milk is delivered by producers to the four creameries maintained by plaintiff upstate and some milk purchased by plaintiff is picked up at the dairies of the purchasers by trucks operated by plaintiff. The milk received is weighed, cooled, strained and tested for butter fat content and acidity. The milk is poured into freight tank cars or tank

trucks for shipment to the company's pasturization and bottling plant in New York City. The cost of these operations at the upstate plants is $.1569 per can.

(c) Cost of transportation. The cost of transporting the milk from the upstate plan-s to plaintiff's pasturization and bottling plant in New York City including the rental paid [fol. 33] by plaintiff for the three tank freight cars used by it and including all trucking expenses is $.3503 per can.

(d) Cost of pasturization and bottling. The milk sold by plaintiff is pasturized and bottled at its New York City plant. The cost of these operations including laboratory expenses and all supplies consumed such as caps for bottles, is $.1538 per can.

(e) Delivery expenses. The cost of delivery including the maintenance of automobiles is $.4107 per can.

(f) All other direct operating expenses. The cost of all other operating expenses including the cost of collecting cases in which milk is delivered, ice which is required in handling milk, labor cost for loading milk on delivery trucks, and breakage of bottles is $.2192 per can.

(g) General expenses and overhead. This item which includes all office overhead including office labor and all salaries paid to officers is equal to $.2509 per can.

(h) Bad debts. Bad debts of plaintiff averaged 1% of sales which from May 16th to July 21st was equivalent to $.032 per can and since July 21st is equivalent to $.036 per can.

(i) Spillage loss. Out of each can of milk purchased by plaintiff there is lost due to unavoidable spillage in the handling of the milk, an average of ½ quart per can.

(j) Amount received by plaintiff for each can of milk [fol. 34] purchased by it. Out of each can of milk purchased by plaintiff containing 40 quarts there was available for sale after the spillage loss 39½ quarts for which plaintiff received between May 16th and July 21st at the rate of $.08 a quart, a total of $3.16 and since July 21st a total of $3.555. These figures show a total operating expense to plaintiff for each can of milk handled by it of $1.5738 per can between May 16th and July 21st, and a total of $1.5778

per can since July 21st. The difference is due to the difference in the loss caused by bad debts which is 4/10ths of a cent greater since July 21st.

A recapitulation of the operating expense of plaintiff since May 16th shows the following:

	From May 16th to July 21st		From July 21st to Sept. 30th	
Cost per can	.1632		.199325	
Upstate Creamery Cost	.1569		.1569	
Transportation	.3503		.3503	
Pasturization and bottling	.1538		.1538	
Delivery	.4107		.4107	
Other direct operating costs	.2192		.2192	
General expense and overhead	.2509		.2509	
Bad debts	.032		.036	
Total operating cost		(1.5738)		(1.5778)
Total cost	3.2058		3.57105	
Amount received	3.16		3.535	
Loss per can	.0458		.01605	

The cost to my company per can for handling the milk sold by it is very reasonable as indicated by a report prepared for and made to the New York State Milk Control [fol. 35] Board by Professor Leland Spencer of Cornell University, an authority on the dairy industry. Professor Spencer in his report calculated the operating cost of thirty dealers in New York City for the month of August, 1933, which is one of the months included in the calculation of the operating cost of my company. His method of segregating costs is different than that followed by my company and he calculated costs in his report on the basis of each quart sold, instead of each can, so that his figures must be multiplied by forty in order to show the cost of handling per can.

Professor Spencer's report sets forth the following as the operating cost of thirty New York City dealers for the month of August, 1933:

Freight	.0063
Plant Costs	.0093
Selling and Delivery	.0293
General and Administrative	.0018
Total operating cost	.0413

The total operating cost thus shown in Professor Spencer's report is .0413 per quart or $1.652 per 40 quart can, which is .0782 per can more than my company's operating expenses from May 16th to July 21st, and .0742 per can more since July 21st. It follows beyond all question therefore, that the operating expenses of my company which are such that my company operates at an actual loss under the price fixed by defendants, are beyond any question reasonable for they are a substantial amount less than the amounts found to be the operating costs of dealers in New York City in the very report made to defendants by Professor Spencer.

Under the prices fixed by defendants as the purchase price and the selling price of the milk, no profit at all is made by plaintiff, and, therefore, no return at all is made [fol. 36] upon the investment which it has devoted to the carrying on of the milk business.

It follows that irrespective of the validity of the statute under which defendants are acting, that the orders which they have issued are invalid and unconstitutional since they confiscate plaintiff's property without due process of law, such orders being the orders fixing prices, and the order directing the revocation of plaintiff's license, which order is based upon plaintiff's alleged violation of the price orders.

Furthermore the orders which defendants seek to enforce against plaintiff and which are annexed to the complaint as Exhibits "D" and "E", *and* invalid, unconstitutional since they were made by the Board against plaintiff without affording to plaintiff due notice of the charges which are the basis of the orders, and without affording to plaintiff a reasonable opportuinty to be heard and to present its evidence before the orders were made.

No notice was ever given to plaintiff of the charge which defendants were making against plaintiff or of the alleged violations of law of which defendants claim plaintiff had been guilty. Plaintiff was given a notice to appear before the defendants acting as the Milk Control Board but the notice set forth no charge or complaint or any statement of any alleged unlawful conduct by plaintiff. Thereafter two perfunctory hearings were held before one member of the Milk Control Board, at which hearing the board for the

first time made known to plaintiff the charge being made against it, namely, that plaintiff had purchased milk at prices below those fixed by defendants in their orders. The proceedings which led to the making of the orders which are annexed to the complaint as Exhibit "D" and "E", [fol. 37] were in all respects like those recently reviewed by the Appellate Division, Third Department in the case of "In the Matter of the Application of Grandview Dairy Inc., Petitioner, for a Certiorari Order Against Charles H. Baldwin et al., Defendants", decided on January 19, 1934, and a report of the case appears in the New York Times of January 20, 1934, in which case the learned Appellate Division, Third Department, ruled that the order of the Milk Control Board revoking the license of Grandview Dairy Inc. unless it should pay over to the milk producers from which it had purchased its milk, certain sums, exactly as the orders against plaintiff provide, was invalid and unconstitutional since it had been made by the Milk Control Board without giving the milk dealer notice of the charges made against it, and due hearing upon these charges.

I respectfully submit therefore, that pending the final determination of the within action that defendants be temporarily enjoined from enforcing the aforesaid statute or any of its provisions against plaintiff, and that said defendants be so enjoined from enforcing against plaintiff the aforesaid orders annexed to the complaint as Exhibits "D" and "E", and that a temporary stay be granted pending the hearing and determination of the within application for a temporary injunction, which shall in the same manner stay the defendants from so acting.

No previous application for the relief herein sought has been made to this or to any other court.

Benjamin Greenberg.

Sworn to before me this 26th day of January, 1934.
M. H. Coleman, Notary Public, Kings County.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

Now come the defendants and for an answer to the plaintiff's bill of complaint plead as follows:

1. Defendants deny certain allegations of the bill of complaint which consist of conclusions of fact and conclusions of law, and respectfully refer to the Court the question whether such conclusions are justified. Such allegations are found in paragraph "Ninth" (second indented paragraph, which is also the last), also "Tenth", "Fifteenth", "Sixteenth", "Nineteenth", "Twentieth", and "Twenty-first".

2. It is respectfully submitted that the true and correct statement of fact which was intended to be made by paragraphs "Fifteenth" and "Sixteenth" is as follows: Defendants acting under the aforesaid statute fixed nine ($.09) cents per quart as the price for which milk of the grade known as "Grade B" milk could be sold in the City of New York at wholesale (i. e., from milk dealers to stores and restaurants) after May 16, 1933. The said price of nine ($.09) cents so fixed by defendants remained in effect until July 21, 1933, when by order of defendants made pursuant to the aforesaid statute, the said wholesale price of said [fol. 39] milk in the City of New York was fixed at ten ($.10) cents per quart, and said price of ten ($.10) cents at all times since has been and is the price which remains in force under the orders made by the defendants under the aforesaid statute. The plaintiff has been making such sales of milk at prices one cent under the respective prices so fixed, and claims the privilege of doing so by reason of section 317, subdivision (c) of the Milk Control Law.

3. The provisions of statutory law last above referred to is in terms applicable to the plaintiff, but it is respectfully submitted that the provision makes an unreasonable and arbitrary classification of milk dealers for the application of different prices to them, in contravention of the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, and hence such provision

of statutory law is void and without effect, as to the plaintiff and as to its competitors.

Wherefore, defendants respectfully pray that the relief asked in the bill of complaint be denied, and that they be excused from further attendance upon the Court, and that the plaintiff be directed to pay them their costs herein incurred.

Henry S. Manley, Counsel to the Department of Agriculture and Markets and for the Milk Control Board; John J. Bennett, Jr, Attorney General of the State of New York, Solicitors for Defendants.

[fols. 40 & 40a] *Duly sworn to by Kenneth F. Fee. Jurat omitted in printing.*

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS

Now come the defendants and move that the bill of complaint be dismissed for the following reasons and upon the following grounds, applicable to both causes of action:

1. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

2. That the same conclusions alleged above appear by the bill of complaint supplemented by certain facts of which this Court takes notice, particularly the statutes and data referred to in the affidavit of Kenneth F. Fee filed herein by the defendants.

Wherefore, for the reasons and upon the grounds aforesaid, the defendants respectfully move this Court that the bill of complaint herein be dismissed.

Henry S. Manley, Counsel for the Department of Agriculture and Markets and the Milk Control Board; John J. Bennett, Jr., Attorney General of the State of New York, Solicitors for the Defendants.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF KENNETH F. FEE

STATE OF NEW YORK,
Albany County:

Kenneth F. Fee, being duly sworn, deposes and says: I am Director of Milk Control and one of the defendants herein, and I have in my official custody the records and reports hereinafter referred to. I respectfuly allege the following facts showing that the relief prayed for herein by the plaintiff should be denied:

(A)

Chapter 158 of N. Y. Laws of 1933, known also as the Milk Control Law, was enacted as a result of a legislative investigation, and the official report of that investigation is found in 1933 Legislative Document No. 114. Because that report contains such material which may cast light upon questions now involved, leave is requested to present relevant excerpts in the brief of either party to this suit.

[fol. 43]

(B)

On or about May 1, 1933, the plaintiff duly verified and filed with the defendants an application for a milk dealer under the Milk Control Law. It appeared from that application that its business consisted principally of buying milk from producers at four country plants in New York State (Youngs Crossing, Maybury Mills, Kortright and Sheds) and selling it in bottles to stores and restaurants in New York City. The question in the application, "Do you agree to comply with all rules and orders hereafter made by the Milk Control Board?", was answered, "Yes". Thereafter a temporary permit was issued to it, and about June 22, 1933 a license was issued and has since been retained by it. This license recited upon its face that it was issued pursuant to the Milk Control Law, and was valid until March 31, 1934, unless sooner revoked. At about the same period under the same provisions of law several hundred competitors of the plaintiff were similarly licensed, and in general

they have obeyed the law and the orders of the defendant Board.

(C)

At various times since the Milk Control Law became effective the defendant Board has made orders purporting to fix minimum prices which the plaintiff and other milk dealers must pay producers for milk purchased, and minimum prices at which the plaintiff and other milk dealers can sell milk and cream for fluid consumptiou. The making of each order followed a public hearing upon reasonable notice and the plaintiff did not appear of record at any such hearing and oppose the making of the order, nor did it attempt to review any such order by certiorari.

[fol. 44] (D)

Under various orders of the defendant Board the minimum prices fixed for sales of quart bottles of Grade B milk in New York City from milk dealers to stores and restaurants were as follows:

April 17 to May 14	8 cents
May 15 to July 20	9 "
July 21 to date	10 "

However the Milk Control Law at Section 317, subdivision c, contains the following provision:

"It shall not be unlawful for any milk dealer who, at the time this act shall take effect, is engaged in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants, to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed by the board for such sales to stores in such a city."

On May 5, 1933, the defendant Board determined, by Order No. 12, that the phrase "well advertised trade name" in the above statutory provisions refers to milk handled by four dealers, as follows:

Bordens Farm Products Co., Inc.
Sheffield Farms Co., Inc.
Dairymen's League Co.
M. H. Renken Dairy Co.

All milk dealers in New York City were afforded an opportunity to name themselves or their competitors for inclusion in that list, and the plaintiff did not request inclusion of its name. Presumably the plaintiff, at all times since the order of the defendant Board were effective, fixing minimum prices upon sales from milk dealers to stores and [fol. 45] restaurants as above stated, has made its sales at prices one cent under the prices so fixed, and claims the privilege of so doing by reason of the statutory provision above quoted. The four companies named, on the other hand, have continued and are continuing to sell to stores and restaurants in New York City very substantial quantities of milk at the minimum prices specified in the orders of the defendant Board.

(E)

Under various orders of the defendant Board the minimum prices fixed for payment from milk dealers to producers for Class 1 milk (milk so marketed as to be used for fluid consumption) and for Class 2-A milk (milk so marketed as to be used for fluid cream) are as follows:

	Class 1	Class 2-A
May 16 to June 30	$1.88	$1.30
June 30 to July 30	1.88	1.31
July 21 to date	2.23	1.55

The price quoted in each case is for a hundredweight of milk testing 3.5 per cent butterfat delivered at a country plant 201-211 miles from New York City, and the price is subject to a freight differential for any greater or lesser distance, and to a butterfat differential for any greater or lesser test. The order in effect now and at all times since July 21, 1933, is Official Order No. 32 as amended by No. 34 (No. 49 amended it as to Grade A premiums, which are not now relevant) and a true and complete copy of that order is annexed hereto.

[fol. 46] (F)

The observance and enforcement of the orders fixing prices to producers are vital to the legislative plan em-

bodied in the Milk Control Law. In general those prices are being enforced successfully against all milk dealers, and no effort will be spared to accomplish that result.

It is true that about 30 per cent of the milk received at the Metropolitan Area (consisting of New York City, Newark and various suburbs and nearby cities) is supplied by producers outside of New York State. A table published by the United States Department of Agriculture, Bureau of Agricultural Economics, Market News Service, purporting to show receipts of milk at the Metropolitan Area for 1932 and 1933, segregated by months and by states of origin and by railroad and truck transportation, is referred to for relevant statistics, and I believe it to be correct. I deny that the defendants, "have recognized their inability to control the milk supply which thus comes into the State of New York from other states". On the contrary, the defendant Board is actively enforcing the provision of the Milk Control Law designed to deal with that problem (§ 312, subdivision g) by investigations, hearings and threats to revoke licenses. These enforcement measures have been successful in many cases and have resulted in additional payments to producers in other states for milk consumed in New York State. The defendant Board also is endeavoring to enforce the provision by suits for injunctions in the courts of New York State. Three such injunction suits have been pending undetermined since December 1, 1933, before Honorable Gilbert V. Schenck, Justice of Supreme Court.

Of the 30 per cent of milk received at the Metropolitan Market from producers outside of New York State, about half comes from Pennsylvania and about a third comes from New Jersey. In New Jersey there is and has been since May 1933 a Milk Control Board, organized under [fol. 47] Chapter 169 of N. J. Laws of 1933, which maintains prices to producers substantially as high as those maintained in New York State. For this and other reasons New Jersey producers are not a serious competitive force in the New York City market. Pennsylvania recently has organized a Milk Control Board, under Act No. 37, approved January 2, 1934. Both the New Jersey statute and the Pennsylvania statute substantially copy the provision quoted above from the New York statute, forbidding sale within the enacting state of milk bought too cheaply from

producers in another state. Besides that provision the Pennsylvania statute includes the following provision, and I am informed and believe that it will be enforced without any general exception or exemption by Pennsylvania authorities as to milk bought in Pennsylvania for sale in New York State:

"It is also declared to be the legislative intent that the producers of milk in this Commonwealth who sell their milk to milk dealers for shipment into and sale in another state, where prices to producers are regulated by a state board or other authority with powers substantially similar to the Milk Control Board established by this act, shall receive the same price that producers in such other state receive for milk purchased for similar purposes and under similar conditions, less a proper allowance for the transportation thereof. It shall be unlawful for any milk dealer, except in any cases in which the board shall otherwise determine, to pay to a producer within this Commonwealth, for milk to be sold in such other state, a price lower than that fixed by the state board or other authority in such other state for sale of milk in such other state for similar purposes and under similar conditions, minus a proper allowance for the transportation of the milk to the market in such other state."

[fol. 48] (G)

The plaintiff filed with the defendant Board reports required by its orders showing payments to producers for the months of May to September inclusive. It has failed and refused to file reports for October and subsequent months. The reports filed were examined by the Board's auditors, who discovered that the payments to producers apparently were incorrect in several respects, and too small. The plaintiff was given due notice of a hearing, which was held at Albany on September 14. Testimony was given under oath by three witnesses and made into a stenographic record. Various reports and other documents were made exhibits. The three witnesses were Benjamin Greenberg, president, Henry Breier, secretary, and Louis Lubitz, accountant, all officers and employees of the plaintiff. At that hearing the plaintiff was not represented

by counsel, but at a reopened hearing on November 13 it was represented by Mr. Rubinton of the firm now appearing for it. I presided. Additional testimony was given by Mr. Lubitz, and also by two auditors for the Board. On November 18 there was mailed to the plaintiff a computation purporting to embody the results of the evidence taken and to show that the plaintiff underpaid producers in the period May to September inclusive a total of $23,692.55. The plaintiff was requested to check that computation, and did so through its accountants, Samuel Heller & Company, of 1440 Broadway, New York City. The report of those accountants dated December 7 concedes underpayments totalling $5,628.68, claims that the plaintiff was entitled under its established practice (although not under any order of the Board) to deduct 15 cents per hundredweight for "hauling milk between plants", amounting to a total of $17,011.14, and accounts for the balance of $1,052.73 through a method of blending or averaging prices somewhat different from that used by the Board's auditors. [fol. 49] Thereafter the defendant Board made the orders which are annexed to the bill of complaint herein, and caused them to be served upon the plaintiff about January 1, 1934. Such orders constitute a determination of the matter, final unless the plaintiff sees fit to review by certiorari, and it has commenced no such proceeding.

It is respectfully represented that the plaintiff has not availed itself of its adequate remedy at law as to such matters; that it has not made the payments totalling $5,628.68 which its own accountants concede to be due; and that by agreeing to abide by orders of the Board and then seeking to underpay its producers in violation of such orders and withholding reports in recent months the plaintiff has disqualified itself to seek redress from a court of equity.

Kenneth F. Fee.

Sworn to before me this 8th day of February, 1934.
William H. Weller, Notary Public.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LAURANCE L. CLOUGH

STATE OF NEW YORK,
Albany County:

Laurance L. Clough, being duly sworn, deposes and says: I am employed by the defendant Board as its Chief Auditor, and have held that position since June 1, 1933. Previously I had assisted Dr. Leland Spencer in research as to the costs of milk distribution, the results of which research are found in 1933 Legislative Document No. 114.

I have examined the affidavit entitled herein verified by Benjamin Greenberg on January 26, 1934. I have given special attention to the costs of operation cited in that affidavit (pages 10 to 15 inclusive of typewritten affidavit).

In the first place it should be noted that cost figures for August 1933 as shown in Professor Spencer's report are not fairly comparable with costs from May 16 to July 21 or from July 21 to September 30. Professor Spencer in his report (mimeographed copy, pages 14-15) noted that there were some abnormal factors involved in August 1933 which may have tended to show unit costs higher than ordinary. If that is so, the fact that plaintiff's costs over a period of four and a half months are higher than those given by Dr. Spencer as an average for the single month does not neces-
[fol. 51] sarily prove that the plaintiff's costs are reasonable. What Dr. Spencer said about abnormal factors in August was as follows:

"The one month of August, however, was a period of vacation and reduced sales. This, together with declining volume of supply, tends to give somewhat higher unit costs and smaller profits for that month. Another factor which undoubtedly affected the results somewhat is the milk strike which lasted through the first ten days of August. This disturbance undoubtedly caused a considerable falling off in milk and cream received and in a few instances may have caused increased expenditures for protection and transportation."

In the second place various circumstances and conflicting data indicate to me that plaintiff's costs are not really as

high as they are represented to be in the affidavit made by Mr. Greenberg. I note on page 13 of the affidavit that the total operating cost from May 16th to July 21st is given as $1.5738, and from July 21st to September 30th as $1.5778 per can. It appears that the only variation in these costs is due to an increase of $.004 in the cost of bad debts. It does not appear reasonable that costs for all other items entering this total operating cost should be identically the same during these two periods. It also seems to me highly improbable that they have been able to make an allocation of costs for the exact periods which they have given, namely, May 16th to July 21st and July 21st to September 30th. It would be a most difficult task to split such items as payroll items and other costs to obtain such costs for a portion of a month.

It is to be noted that on page 10 of the affidavit, Item A, "Cost of Milk to Plaintiff", (after May 16th and to July 21st, 1933), the plaintiff states as follows: "The milk purchased by plaintiff averaged and still averages 3.6% butterfat content. The price fixed by defendants from May 16th to July 21st, 1933, was $1.88 per hundred pounds for 3.5% butterfat plus 4¢ per hundred pounds for each 1/10 of 1% of butterfat content. The price of one hundred [fol. 52] pounds of such 3.6% butterfat milk would be $1.92 and the cost of a can of milk containing 85 pounds is 85/100 of $1.92 or $1.632." Upon the basis of information given in the reports filed by the plaintiff with the Milk Control Board and from testimony given at the hearing held for the plaintiff, I have computed that on the basis of Class 1 prices set by the Board, the average price that would have been paid at the various plants operated by the plaintiff during the period May 16th through July 21st should be $1.593. This cost per can is $.039 lower than the price given by the plaintiff, and the difference is due to the fact that some of the plants operated by the plaintiff are outside of the 201-210 mile zone, and also due to variations in butterfat content from 3.6%.

The plaintiff on page 6 of his affidavit states that "All the purchases made by the plaintiff are made within the territory known as the 200-210 mile zone, this being the distance of such territory from New York City." I believe that the plant at Maybury Mills is in the 231-240 mile zone; the plant at Youngs Crossing in the 241-250 mile

zone; the plant at Kortright Station in the 176-180 mile zone; and the plant at Sheds Corners in the 251-260 mile zone. Therefore, the price to be paid to the producers for milk in three of these zones is less than the price set forth by the plaintiff for the 201-210 mile zone due to the freight differential which is allowed to be deducted in our Official Orders 17 and 32.

The plaintiff also states further that for the period from July 21st to September 30th, 1933, the cost per can of milk was $1.99325. I have found that the cost at the plants operated by the plaintiff for Class 1 milk during this period should be $1.9703, indicating a difference of $.02295. This difference is also due to the fact that some of the plants operated are outside of the 201-210 mile zone and also due to variation in the butterfat content of the milk.

[fol. 53] Mr. Duerr, our auditor, under my supervision, obtained from the books and records of the Hegeman Farms Corporation, certain figures representing the cost of operating their business during the months from April to September, 1933. Mr. Duerr gave testimony regarding these costs at the hearing held for the Hegeman Farms Corporation and later went over these figures with Mr. Lubitz, Accountant for the Hegeman Farms Corporation. He made certain corrections as per his letter of November 20th, 1933.

Mr. Duerr found that the cost of operating the business of the plaintiff as indicated by their records and accounts was for the month of May, $31,897.49; for the month of June, $31,056.68; for the month of July, $29,558.76; for the month of August, $32,943.01; and for the month of September, $26,431.00. Taking these costs and dividing them by the amount of milk handled during each of these months gives a cost per hundred pounds of $1.2563 for May; $1.1006 for June; $1.2723 for July; $1.5507 for August; and $1.0053 for September. For the months from May to September, inclusive, the total costs were $151,886.94 or $1.22122 per hundred pounds, or $1.038 per can. These costs include cost of operating the creameries, cost of operating the city plants, the delivery cost, general and overhead costs and freight costs, and are given in detail on the sheets prepared by Mr. Duerr. These costs also include items of considerable size for depreciation. It is submitted that the costs as given by the plaintiff far exceed these costs as determined by examination of their records.

On page 10 of the affidavit submitted by the plaintiff, he states as follows: "My Company sells practically all of the milk purchased by it for consumption as fluid milk. A very negligible amount, not more than one per cent of the milk, is sold as fluid cream. The figures I am setting forth are calculated without taking into consideration the sales of fluid cream since such sales are so trifling in amount as to have no effect in the calculation." I have examined the re-
[fol. 54] ports as submitted by the plaintiff and also testimony given at hearings, and I find that for the period of May 16th through September 30th, inclusive, the plaintiff received at its country plants, 11,340,762 pounds of milk. Of this amount, there was reported to have been sold in the form of fluid cream, 1,336,615 pounds of this milk, or 11.8%. There was also sold in the form of cream classified as Class 2-C, 135,020 pounds, somewhat over one per cent of the total amount received, so that of the total amounts received, 12.98% was sold in other forms than fluid milk. This does not appear to be very negligible.

Laurance L. Clough.

Sworn to before me this 8th day of February, 1934.
William H. Weller, Notary Public.

[fol. 55] EXHIBIT TO AFFIDAVIT OF KENNETH F. FEE

State of New York, Department of Agriculture and Markets

Milk Control Board

In the Matter of Fixing Minimum Prices to Be Paid by Milk Dealers to Producers and Others for Milk

Official Order No. 32, as Amended by Official Order No. 34

Such investigations and proofs as the emergency permits having been made, and public hearing having been had after reasonable notice to the public generally through newspapers and otherwise, and due deliberation having been had, it is hereby ordered:

1. For the purposes of this order milk is classified as to its uses, into nine classes, as follows:

(a) Class 1 milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization by human consumption as raw or pasteurized milk. It includes all milk leaving a milk plant or receiving station in fluid form, in the absence of clear proof that such milk is so utilized as to fall into some other class. It also includes all milk utilized in any manner not included within the classes defined hereinafter.

In the case of a dealer who receives or handles not more than fifteen hundred forty-quart cans of milk (or its equivalent) per month, any part of which is Class 1 milk, at least seventy-five per cent of all milk (or its equivalent) received or handled by him shall be included in Class 1, and the remainder in Class 2-A.

(b) Class 2-A milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization as fluid cream. It includes all milk made into sweet or sour cream and leaving a milk plant or receiving station in such form, in the absence of clear proof that such milk is so utilized as to fall into some other class.

(c) Class 2-B milk is defined as including any milk purchased or received or handled by a milk dealer and so marketed as to be readily open to the supposition that it will find its ordinary utilization as plain condensed milk and in certain forms of cheese. It includes milk made into plain condensed milk, all milk used in the manufacture of cheeses of the soft type, such as Neufchatel, Pimento, Pimento Olive, D'Isigny, Port DeSalut, Lunch, Kosher, Petit Suisse, etc., and any other cheese except those specified by names in Classes 3 and 4-B.

(d) Class 2-C includes all milk used in the manufacture of ice cream in New York City and milk from which is derived fresh or storage cream and unsweetened condensed milk, used in the manufacture of ice cream in New York City. It also includes milk from which is derived storage cream used in the manufacture of sour cream.

(d-1) Class 2-D includes all milk used in the manufacture of ice cream outside of New York City and milk from which

is derived cream and unsweetened condensed milk used in the manufacture of ice cream outside of New York City.

[fol. 56] (d-2) Class 2-E includes all milk from which is derived fresh or storage cream used in the manufacture of cream cheese.

(e) Class 3 milk includes milk which is used in the manufacture of sterilized and evaporated whole milk, sweetened whole condensed milk, milk chocolate, whole milk powder, powdered malted milk; also all milk to which milk fat is added that is used in the manufacture of milk powder; also all milk that is used in the manufacture of Cream, Swiss, Limburger, Munstor, Pineapple, Edam, Gouda, De Brie, Camembert, Hard Italian, Brick, Farmers Pressed Cheese, Cottage Cheese and other cheeses of similar type.

(f) Class 4-A milk shall include all milk that is made into butter.

(g) Class 4-B milk shall include all milk that is made into American Cheese.

2. It shall be presumed, in the absence of clear proof to the contrary, that any milk purchased or received or handled by a milk dealer, except at a plant or receiving station engaged continuously and solely in manufacturing the milk, leaves such plant or receiving station in fluid form.

3. It shall likewise be presumed, in the absence of clear proof to the contrary, as to any milk dealer buying milk within the State of New York, and also buying elsewhere, that all milk marketed or utilized within the State in Class 1 is milk purchased within the State to the full amount available therefore, and likewise as to each successive lower class.

4. The prices hereinafter established shall not apply to milk sold to the state or any municipality or to the federal government upon bids, but any milk dealer claiming exemption under such provisions shall make written and verified application for such exemption, in form satisfactory to the Board, if possible before purchasing or receiving or handling the milk as to which exemption is claimed.

5. The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 1 milk. Such base price shall be based upon delivery of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-210 miles distant from New York City. No off rail differential shall be allowed except as specially authorized by the Board. Such base price shall be subject to certain differentials, as follows, all or any of which may apply to a specific transaction:

(a) Freight differential. The actual price for Class 1 milk marketed for consumption in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk is ascertained by adding to the base price at the 201-210 milk freight zone 53¢ per 100 pounds, and deducting from the result thereby obtained the actual freight rate applying per 100 pounds of milk from there to New York City, but there shall not be deducted an amount in excess of 59½¢ per 100 pounds. A schedule hereto annexed indicates the freight differential which is to be applicable until further notice. There shall be no freight differential for Class 1 milk marketed for consumption elsewhere in the State than in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk. Milk received or handled at a milk plant or receiving station less than 200 miles from New York City shall be presumed to be marketed for consumption in New York City or in the counties of Rockland, Westchester, Nassau and Suffolk, in the absence of clear proof to the contrary.

[fol. 57] (b) Milk fat differential. The actual price is ascertained by adding to the base price in the case of milk testing more than 3.5%, or subtracting from the base price, in the case of milk testing less than 3.5%, four cents per 1/10th of 1% of milk fat.

(c) Grade A. differentials. Milk which is qualified under the New York City Department of Health requirements for sale as Grade A, and which is delivered to plant similarly qualified, shall have added to the base price the following differentials:

Butterfat	10,000 or less bacteria colonies per c. c.	10,000 to 25,000 bacteria colonies per c. c.
3.0	.10	.50
3.1	.15	.075
3.2	.20	.10
3.3	.25	.15
3.4	.35	.20
3.5	.40	.25
3.6	.45	.30
3.7 and above	.50	.35

No increased differential for additional points of butterfat above 3.7%. Existing arrangements between any co-operative association and milk dealers buying through it from its producer members, affecting Grade A differentials, may be continued.

6. The base price established by this order for Class 1 milk is $2.23.

7. The board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 2-A milk. Such base price shall be based upon the delivery of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price shall be subject to certain differentials, as follows, all or any of which may apply to a specific transaction:

(a) Freight differential. The base price shall apply to all points 201-225 miles, both inclusive from New York City, with 1¢ per 100 pounds of milk added for every 25 mile zone under 201 miles, and 1¢ per 100 pounds of milk deducted for every 25 mile zone over 225 miles.

(b) Milk fat differential. The same differential provided for Class 1 milk shall apply to Class 2-A milk also.

(c) Grade A differential. The same differential provided for Class 1 milk shall apply to Class 2-A milk also.

8. The base price established by this order for Class 2-A milk is $1.55.

9. The Board will establish by this order, and may from time to time change by other orders or by amending orders,

a base price for Class 2-B milk. Such base price shall be based upon delivery of one hundred pounds of milk containing 3.5% of milk fat to milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price shall be subject to the same differentials provided for Class 2-A milk.

10. The base price established by this order for Class 2-B milk is $1.75.

11. The Board will establish by this order, and may from time to time change by other orders or by amending orders, a base price for Class 2-C milk, a base price for Class 2-D milk, and a base price for Class 2-E milk. Such price in each case shall be based upon deliveries of one hundred pounds of milk containing 3.5% of milk fat to a milk plant or receiving station at a railroad point 201-225 miles distant from New York City. Such base price in each case shall be subject to the same differential provided for Class 2-A milk.

[fol. 58] 12. The base price established by this order for Class 2-C milk is $1.45.

The base price established by this order for Class 2-D shall be not less than 25 cents more than the price determined for Class 4-A.

The base price established by this order for Class 2-E shall be not less than 20 cents more than the price determined for Class 4-A.

13. The price for Class 3 milk shall be the average paid at mid-west condenseries, as determined by the Board at the end of each month, plus not less than 10¢ per hundred pounds of milk, the milk fat differential to be figured upon a direct ratio between milk fat content and price. The prices above fixed apply to all points 201-250 miles, both inclusive, from New York City, with 1¢ per 100 pounds of milk added for every 50 mile zone under 201 miles, and 1¢ per 100 pounds of milk deducted for every 50 mile zone over 250 miles.

14. The price for Class 4-A milk shall be determined for the month during which the milk is handled, by taking the official New York average outside quotations for 92 score butter, deduct four cents a pound for making, and figure an overrun of 16%.

15. The price for Class 4-B milk shall be determined for the month during which the milk if handled, by taking the average of the weekly quotations per pound of cheese with differentials as indicated at the following markets, or of the quotation with differentials as indicated from such of these markets as may issue quotations during the period: Single daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus one cent per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York. From the average price of cheese as determined from these quotations and differentials shall be deducted three cents per pound of cheese allowance for making, and the price per 100 pounds of milk shall be computed according to the yield of cheese per 100 pounds of milk, as follows:

B. F. test	Cheese yield	B. F. test	Cheese yield	B. F. test	Cheese yield
3.0%	8.30	4.0%	10.60	5.0%	12.90
3.1%	8.53	4.1%	10.83	5.1%	13.13
3.2%	8.76	4.2%	11.06	5.2%	13.36
3.3%	8.99	4.3%	11.29	5.3%	13.59
3.4%	9.22	4.4%	11.52	5.4%	13.82
3.5%	9.45	4.5%	11.75	5.5%	14.05
3.6%	9.68	4.6%	11.98		
3.7%	9.91	4.7%	12.21		
3.8%	10.14	4.8%	12.44		
3.9%	10.37	4.9%	12.67		

16. The prices hereby established shall be the minimum prices to be paid by milk dealers to producers and their representatives for milk of the respective classes mentioned; provided, that the prices hereby established shall not apply to purchases by a milk dealer who does not purchase or handle any Class 1 or Class 2 milk. From and after the effective date of this order, and until the Board orders otherwise, no milk dealer shall purchase or receive or handle milk unless payment is made to the producer, or to a cooperative corporation organized or operated under or subject to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing of milk for the producers thereof, for the benefit of its producers, at a rate not less than the rates hereby established. Such payment shall be made in cash or by check not more than forty-six days after delivery of the milk from the producer or on his behalf. Such payment shall be based upon the aggregate of milk received at the plant or receiving station from all producers during the period covered by the payment, except that the Board may, by special permit to specific milk dealers, authorize them to base payment upon

the aggregate of milk received at several plants or receiving stations which are operated together for marketing purposes, or make other special provision. Where some milk included in the payment is of two or more different classes the payment shall be at a rate which will truly represent the proportions of each.

[fol. 59] 17. No milk dealer shall buy or offer to buy milk at any price less than the price hereby established applicable to such transaction and no method or device shall be employed whereby milk is bought or offered to be bought at any lesser price, whether by any discount, or rebate, or excessive charge of hauling or other service, or any other method or device whatsoever. Any method or device which is employed in an effort to defeat the intent of this order as well as any direct violation of it, will be deemed sufficient cause to suspend or revoke the license of the offending milk dealer without further or specific warning.

18. Not later than the 12th day of each month, except as the Board may otherwise provide in special cases, every milk dealer shall file with the Board a report covering individually each milk plant or receiving station operated by him, except as the Board may otherwise provide in special cases, giving in detail covering the preceding month the following information:

(a) Name of dealer and location of plant.
(b) Total amount of milk received from all sources.
(c) The average price per hundred pounds of 3.5 milk delivered at the plant, computed according to the prices established by this order and any amendment thereof.
(d) Whether payment is made by the dealer directly to producers, or to a co-operative association, and upon what date or dates payment will be made.
(e) Number of producers.
(f) Total amount of milk utilized under each of the various classes and the price for each such class.

Such report shall be in a form to be prescribed by the Board and shall be sworn to by the milk dealer, or by a responsible and well informed officer or employee acting for him. The milk dealer shall keep available at this office, if a regular office is maintained separate from the milk plant or receiving station, and otherwise at such plant or station, for at least one year after filing such reports, the books of account and other records upon which it is based, which shall

be in form readily to substantiate and afford a check upon the information contained in the reports. Such records shall include the full name and post office address of each individual producer from whom the dealer has received milk, together with his serial number, the number of pounds of milk received from each individual producer, and the milk fat tests as determined by the dealer. Such records shall also include records of every shipment and sale of any milk or milk product from the milk plant or receiving station.

19. This order (as amended by Official Order No. 34) shall take effect at 1 A. M., Eastern Standard Time on Friday, July 21, 1933.

Milk Control Board, Charles H. Baldwin, Thomas Parran, Jr., Kenneth F. Fee.

Dated at Albany, N. Y., July 19, 1933.

[fols. 60 & 60A]

Zone Prices and Freight Differential
Official Order No. 32 as Amended by Official Order No. 34

Miles	Freight rate 40-quart can Class 1 milk	Freight allowance per 100# Class 1 milk	Miles	Freight rate 40-quart can Class 1 milk	Freight allowance per 100# Class 1 milk
10 or under	$.20	$.235	201–210	$.385	$.455
11–20	.21	.245	211–220	.40	.47
21–25	.225	.265	221–225	.405	.475
26–30	.225	.265	226–230	.405	.475
31–40	.235	.275	231–240	.41	.48
41–50	.25	.295	241–250	.41	.48
51–60	.26	.305	251–260	.425	.50
61–70	.27	.32	261–270	.43	.505
71–75	.28	.33	271–275	.435	.51
76–80	.28	.33	276–280	.435	.51
81–90	.29	.34	281–290	.44	.52
91–100	.30	.355	291–300	.45	.53
101–110	.305	.36	301–310	.455	.535
111–120	.315	.37	311–320	.46	.54
121–125	.325	.38	321–325	.465	.545
126–130	.325	.38	326–330	.465	.545
131–140	.335	.395	331–340	.475	.56
141–150	.34	.40	341–350	.48	.565
151–160	.355	.42	351–360	.485	.57
161–170	.355	.42	361–370	.49	.575
171–175	.365	.43	371–375	.495	.58
176–180	.365	.43	376–380	.495	.58
181–190	.375	.44	381–390	.50	.59
191–200	.385	.455	391–400	.505	.595

NOTE: The above applies to all points except those shown on the following list from which points the Railroads have different rates as indicated.

Auburn, N. Y.	.455	.535	Newark Valley N. Y.	.41	.48
Belle Meade, N. J.	.30	.35	Owego, N. Y.	.41	.48
Dryden, N. Y.	.41	.48	Spencer, N. Y.	.41	.48
Locke, N. Y.	.45	.53	Waterville, N. Y.	.41	.48
Moravia, N. Y.	.45	.53			

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BENJAMIN GREENBERG

STATE OF NEW YORK,
City of New York,
County of Kings, ss:

Benjamin Greenberg, being sworn, says:

I am president of plaintiff and I submit this additional affidavit in support of the motion made herein for a temporary injunction, and particularly with reference to some of the statements made in the opposing affidavit.

I

Defendants point out in their answering affidavits that when plaintiff applied for a license as a milk dealer under the present Milk Control Law, that the application which it signed contained an agreement to comply with the rules and orders made by defendants. The application for the license made by plaintiff cannot in any sense be deemed to have been a waiver of plaintiff's right to test the constitutionality of the statute, for the application was made not voluntarily but by compulsion of the statute itself, since it was practically impossible for plaintiff to attempt to carry on its milk business without a license. The consequence would have been the immediate halting of plaintiff's activities by the New York State officials, for pro-
[fol. 62] ducers would not have been permitted to sell to an unlicensed dealer and storekeepers would not have been permitted to purchase from an unlicensed dealer. The necessary result would have been the destruction of plaintiff's business and the consequent destruction of a large part of the value of its properties, even though the law had ultimately been deemed invalid in any litigation brought by plaintiff to test the right of the state officials to prevent plaintiff from carrying on its operation without a license.

Furthermore, the application made by plaintiff can have no relevancy to the attack made by plaintiff on the validity of the price fixing orders made by defendants, and of

the order revoking plaintiffs' license, which is based on the price fixing orders. An agreement to comply with orders to be made by defendants certainly would not contemplate an obligation to comply with unconstitutional orders, for such orders are void and cannot be considered as orders at all for any legal purpose.

II

Defendants urge that plaintiff made no attempt to review the orders of defendants by certiorari. There is no merit in this objection. This court has full jurisdiction to protect the rights of plaintiff in so far as they are rights which are guaranteed by the Federal Constitution, and the only basis upon which this court's jurisdiction has been invoked is that plaintiff's rights under the Federal Constitution have been violated by the statute and the defendants' orders. Because plaintiff might have sought remedy by a certiorari proceeding in the state court in no way deprives this court of its well settled jurisdiction to grant equitable relief when the acts of a state official under [fol. 63] an unconstitutional state law or under an unconstitutional administrative order threaten irreparable injury to an aggrieved party.

Moreover, plaintiff could not have sought the full relief which it seeks in this court by any certiorari proceeding for plaintiff in a certiorari proceeding could only review the jurisdiction of the defendants as defined by the statute itself and the validity of the orders made by the defendants under the statute and could not attack the constitutionality of the statute. Likewise in a certiorari proceeding plaintiff would be limited to a review of the past acts of defendants and could not obtain relief against enforcement of the statute in the future, which is part of the relief sought in the within litigation.

III

The opposing affidavits state that all milk dealers in New York City were afforded an opportunity to name themselves or competitors for inclusion in the list made up by defendants of "well advertised" trade names. The plaintiff has no well advertised name and the milk itself is not sold under any well advertised name. Plaintiff does no ad-

vertising at all, so that even had they sought to be named as one of those coming within the category of well advertised trade names, their attempt would have been futile, for defendants certainly do not take the position that any dealer could have been placed in the category of having a well advertised trade name, merely by applying for inclusion, irrespective of the actual fact.

In defendants' answer the plea is made that the portion of the statute which permits sellers of non-advertised milk to charge one cent less than sellers of advertised milk, [fol. 64] creat-s an unreasonable and arbitrary classification of milk dealers and is unconstitutional under the Fourteenth Amendment.

It is of course extremely doubtful whether defendants who are state officials charged with the duty of enforcing a statute passed by the instrumentality of the state may themselves urge that the statute is unconstitutional. Certainly, defendants did not deem the statute unconstitutional when they made their orders, for in their orders of May 11, 1933, Official Order No. 16 and July 16, 1933, Official Order No. 35, defendants expressly provide, that dealers selling non-advertised milk could sell such milk at a price of one cent per quart below the price of milk sold under the well advertised trade names.

Defendants in pleading that the statute is invalid in so far as it makes a distinction between dealers who sell advertised and unadvertised brands, seemingly take the position that the plaintiff would have been and is bound by the same price which defendants fixed for the vendors of advertised brands. This would mean that the minimum price at which plaintiff could sell its milk would be the same minimum price at which the sellers of advertised brands, such as Sheffield's or Borden's, sell their milk. If the statute has the meaning which defendants thus ascribe to it, then the statute would operate so as to destroy the business of plaintiff, for plaintiff could not sell any milk at all if it could only sell at the same price as dealers who sell well advertised brands. As between milk offered at the same price, it is manifest that buyers would take only the well known brands even though, as is the case with milk, there is no difference in quality, by reason of the strict health regu-

[fol. 65] lations of the state and city. The result of the statute as interpreted by defendants in their answer would be an almost complete ending of the demand by consumers for any but well known brands of milk, since there would be no price advantage in buying the unknown brand of milk. If defendants' position was sustainable therefore, the result of the statute would be the destruction of the business of the independent dealers of the state and a creation of a monopoly in favor of the few dealers of well known brands.

IV

The opposing affidavits state with reference to the problem of the milk which is imported into the State of New York from other states, that statutes have been enacted in other states similar to those in New York for the purpose of maintaining high prices for producers, and that in the case of one statute, there is a provision which fixes the price of milk purchased to be shipped into another state at the same price as the purchase price of milk in the state into which the milk is to be shipped.

The adoption of statutes in other states can in no way affect the problem of the milk coming into New York from outside this state, for in the states adjoining New York, there is a great surplus of production, so far as any local demand is concerned, and the milk produced can only be sold for shipment into the State of New York and for use in New York City. The fixation of prices in these other states cannot aid the local producer who is unable to sell his product excepting for shipment into New York. Such sale will be a part of interstate commerce, and the various states which supply New York City with milk can no more regulate this interstate commerce by fixing prices at which milk may be sold for shipment into New York, than the [fol. 66] State of New York can regulate the price at which milk may be purchased for the purpose of being brought into New York. Both are attempts to impose a direct burden on interstate commerce.

The opposing papers deny that defendants have recognized their inability to control the milk supply which comes into New York from other states. This statement is directly contrary to all of the reports which have appeared in the current press and which are apparently authentic. In addition to the statements which are referred to in

plaintiff's moving papers, I refer the court to a statement which appeared in the New York Evening Post of February 9, 1934, which is an account of a meeting of milk producers held at Syracuse. The article reads in part:

"They listened intently to Charles H. Baldwin, State Commissioner of Agriculture and chairman of the State Milk Control Board, and Fred H. Sexauer, president of the Dairymen's League, who told them that the whole price structure of the milk business is on the point of collapse.

"Only an effective Federal agreement, and that forthcoming promptly, can avert chaos, they were told."

V

The opposing affidavits state that the price paid by plaintiff to producers for its milk is properly calculated for the period up to July 21st at $1.593 instead of $1.632 as set forth in the moving papers. This is a difference of $.039 a can of milk, and since according to plaintiff's figures, it sustained a loss during the period of $.0458 a can, it would be immaterial, if there were no other factors to consider, whether the price paid for milk was that stated in plaintiff's papers or that stated in the opposing papers, for in either case, there would be no return at all to plaintiff.
[fol. 67] The same is true with the period from July 21st to September 30th, in which the moving papers fix $1.99325 per can as the cost per can to plaintiff and in which the opposing papers fix the price at $1.9703, a difference of $.02295 per can. According to the moving papers the operating loss during the July 21st to September 30th period, was $.01605 a can, so that if no other factors were involved, the only difference between plaintiff's and defendants' figures would be that plaintiff would be making $.0069 a can, an infinitesimal operating profit, which could not possibly offer plaintiff a fair return.

The opposing papers however, assert that plaintiff's actual operating costs are less than stated in the moving papers. The opposing affidavits urge that it is improbable that plaintiff was able to allocate costs for the exact periods between May 16th and July 21st and from July 21st to September 30th. In preparing the figures with reference to this operating cost per can, plaintiff made no attempt to allocate costs in the manner assumed by the opposing affidavits. The figures set forth are calculated upon the entire

period from May to September inclusive, which method of calculation was entirely proper, since the operating costs during that entire period were uniform, for there was no change in labor cost, in freight cost or in charges to depreciation nor in overhead expenses. The figures in the moving papers are based upon the total operating costs and the total sales for the May to September period, and for this reason the operating costs, with the exception of bad debts, are identical for the May 16th to July 21st and from the July 21st to the September 30th period.

The opposing affidavits urge that plaintiff's sales of [fol. 68] cream are not trifling in amount for the purpose of calculating operating expenses and point out that approximately twelve per cent of the milk purchased by plaintiff was purchased for the purpose of resale as fluid cream. This overlooks that the plaintiff in processing milk into cream must use from five and one-half to eleven quarts of milk to make one quart of cream, dependent upon whether the cream is light, heavy or medium in grade. The actual quantity of cream handled is therefore only between one and two per cent of the total volume of sales made by plaintiff, although the milk purchased for the purpose of making cream amounts to eleven or twelve per cent of the total purchases of milk. Plaintiff's business therefore consists in its ultimate analysis of ninety-eight to ninety-nine per cent of milk sales, so that in the calculations made for the purpose of estimating operating expenses, the sales of cream could properly be disregarded.

The operating costs as set forth in the moving papers were prepared by Mr. Louis Lubitz, the accountant for plaintiff, after he had made an analysis of plaintiff's records. Mr. Lubitz is not in the exclusive employ of plaintiff, but carries on a general accounting practice.

Defendants' affidavits set forth figures showing operating costs for plaintiff's business, lower than those set forth in the moving papers. These opposing affidavits were served on Saturday, February 10th, 1934, and I have not had an opportunity to obtain from Mr. Lubitz the detailed figures upon which he made his calculations of operating costs. If the court desires these detailed figures in connection with the present application, I respectfully ask for an opportunity to submit them after the hearing of the [fol. 69] argument.

The opposing papers point out that in Professor Spencer's report he states that there were abnormal factors involved in August 1933 which affected operating expenses. The abnormal expenses referred to in the Spencer report were a milk strike of New York State producers and decreased volume of sales by reason of the month being a vacation period. So far as plaintiff's own business is concerned, these factors in no way affected its volume of sales, and its operating costs for the month of August were with possible inconsequential variations the same as those for the other months within the period of May to September. Plaintiff's average operating costs during the entire year are moreover higher than those shown in the moving papers for the period of May to September, since the cost of operating per unit of sales is higher in the winter months than it is in the summer months.

The factors referred to in Professor Spencer's report may have affected the operating costs per unit for the month of August for some wholesale dealers but the greatest result of these factors could not have been to increase operating costs per unit more than a few cents per can of sales, so that even taking into consideration the special circumstances that existed during the period covered by the Spencer report, his report nevertheless demonstrates that plaintiff's operating expenses are fair and reasonable.

Benjamin Greenberg.

Sworn to before me this 12th day of February, 1934.
M. H. Coleman, Notary Public, Kings Co.

[fol. 70] In United States District Court, Southern District of New York

Hegeman Farms Corporation, Plaintiff,

against

Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee, as Members of the Milk Control Board of the State of New York, Defendants

Before L. Hand, Circuit Judge; Bondy and Patterson, District Judges

Upon return to an order to show cause why an injunction pendente lite should not issue. Upon motion by the defendant to dismiss the bill.

Samuel Rubinton for the plaintiff.
Henry S. Manley for the defendants.

OPINION

L. HAND, Circuit Judge:

The decision of the Supreme Court on March 5, 1934, declaring constitutional the "Milk Control Law" of New York, (Chapter 158 of the Laws of 1933), has answered the first cause of suit alleged in this bill of complaint. The court there held that the regulation of the price of milk by the "Milk Control Board" was lawful, and that its orders could be enforced. The second cause of suit remains, which is that the Board has in administering this law deprived the plaintiff of its property without due process of law, because its license will be revoked unless it repays to those who sold it milk the difference between the price fixed by the Board and lower prices at which it [fol. 71] bought. The Board had fixed minimum prices not only for the purchase of milk, but for the plaintiff's sales to its customers, shops and restaurants in New York; and it alleges that, though in form only a minimum, this selling price was in effect a maximum price due to the keenness of the competition between wholesalers. The result has been that the "spread" between what the plaintiff must pay and what it can get, is so small that it can earn nothing upon its very substantial capital invested in the business. This takes away its property under the Fourteenth Amendment. The prayer of the bill is to enjoin the execution of two orders of the Board; one, dated December 29, 1933, which revoked its license under § 308 (3), and which was to become effective January 31, 1934; the other, dated December 30, 1933, which suspended this revocation provided that before January 31, 1934, the plaintiff paid to those of whom it bought milk the difference above mentioned. Since proceedings by certiorari in the Supreme Court of New York are wholly judicial in character, People v. Wilcox, 194 N. Y. 383, this court, constituted under § 266 of the Judicial Code, has jurisdiction over the suit, regardless of the completeness of that proceeding as a remedy. Bacon v. Rutland R. R. Co., 232 U. S. 134; Prendergast v. N. Y. Telephone Co., 262 U. S. 43; R. H. Commission vs. Duluth St. Ry. Co., 273 U. S. 625. There is moreover ground for

equitable intervention, because the money which the plaintiff is required to pay will be distributed among numerous milk farmers from whom recovery will probably be impossible, and certainly impracticable at any cost which would justify the effort. We are therefore obliged to decide the merits of the second cause of suit.

[fol. 72] Although during the period in question, there had been, as we have said, a minimum selling price, the plaintiff cannot complain of that. If it wished to sell at a higher price, it always could, so far as any order of the Board went. If in practice the price could be pushed no higher than the minimum, the order was not responsible for that; it was the competition in the trade which kept down the price. We are not wholly clear whether the plaintiff means further to lay as a grievance the fixing of a purchase price for milk, regardless of any order touching its selling price, but we shall assume that the bill goes so far. That is the inverse of the usual situation, where the costs are left free but the sales price is fixed; the usual "rate case" of a "utility company", of which Smyth v. Ames, 169 U. S. 466, is the progenitor. In such situations it is impossible to change the costs, because they are not controlled by the company, and the regulation of the selling price puts it in a strait jacket. But when the cost of a prime raw material is fixed, unregulated manufacturers who must buy at that cost, will collectively try to impose the increase on the buyers. It is impossible à priori to foretell how far they will succeed. In some cases the trade may have been selling at margin enough to absorb the cost and still leave a profit; they may have to bear the loss among themselves. If they do, fixing the cost has not deprived anyone of his property, however comprehensively that notion be understood. On the other hand some selling units may have to be eliminated, the "marginal producers"; a reduction in production will follow and almost always a rise in price. Apparently it is this result which the plaintiff asserts to be a taking of his property. The [fol. 73] first effect may be to make all sell at a loss and there may be a marked lag before any adjustment, but plainly the loss cannot be permanent and general, or the trade will perish. The most that the plaintiff can ask of us is to assume that in the eventual accommodation it will prove one of the weak selling units and will go to the wall. We shall take the bill as going so far.

It must be apparent that such a doctrine will have wide effects. All sorts of regulations may affect the price of materials or machinery necessary to another industry. The elimination of fire hazards may require high rents; they may not be attainable. The observance of sanitary regulations in factories may be expensive; more than the market will bear. Conformity with prescribed standards of quality and packing may turn a living profit into a loss. Excise taxes are a part of manufacturing cost; the buyer cannot always be made to absorb them and the added load may drive out some producers. Workmen's compensation or a change in employers liability may prove the straw which breaks the camel's back. If the plaintiff be right, in every case the validity of the regulation would depend upon whether the addition to the cost resulted in the elimination of some of the producers. Legislation could scarcely go on at all if its indirect results, its final incidence, must be so nicely adjusted. Nor does it follow that it ought to be. Surely it is a mild assumption that the more vital interest in the end may demand that there should be less goods sold at higher prices, rather than that all existing manufacturers should remain in business. He would be a hardy exponent of non-interference who should assert the opposite to-day; if for instance the rise in cost was due to improvements in working conditions, or in the hygienic quality of [fol. 74] the product. The purpose served by fixing the price of a raw material may be as imperative as either of these; certainly it is not the function of a court to set the hierarchy of social values. In the past, it is true, there were at times expressions in the books which seemed to say that one kind of governmental purpose would justify interference where another would not. The "Police Power" was sometimes spoken of as though it concerned only "health and safety". That mode has disappeared; the purpose of the State of New York to preserve its dairy industry may involve remote repercussions as mortal to some individuals, as its purpose to abolish sweatshops; but once it be agreed that the state may interpose for either end in the "free play of supply and demand", the incidents follow. It is not critical that some will find themselves unable to withstand the pressure and will collapse.

So far as we can find, the plaintiff's argument has not hitherto been put forward; at least we are referred to no

decision which touches it, nor can we find any except a caveat in N. Y. Central R. R. Co. v. White, 243 U. S. 188, 205, that compensation awards might become too "onerous" to be "supportable". It is dangerous to deal in universals, especially in constitutional law, and it might be too much to say that no minimum price could be too high, even though it ruined the whole of other industries, and was quite unnecessary to the protection of that for which it was fixed. The bill lays no such case; it merely alleges that the plaintiff cannot make any money by selling milk bought at the minimum fixed by the Board. Just as it is exposed to the rubs of competition in what it buys on an uncon- [fols. 75 & 76] trolled market, and must make such fetch to adjust as it can, so it must accommodate its dealings to a price fixed, as we now know, in the plenitude of municipal power. That power once granted, its transmitted disturbances the Fourteenth Amendment does not neutralize.

Order to show cause discharged.

Bill dismissed.

[fol. 77] In United States District Court

[Title omitted]

Findings of Fact

1. This is a suit of civil nature in equity, between citizens of the same state, which arises under the Constitution of the United States, and the matter in controversy exceeds three thousand dollars exclusive of interest and costs.

2. Plaintiff is a domestic corporation of the State of New York, engaged in that State in buying milk from producers and reselling it at wholesale in New York City as cream and Grade B milk.

3. The defendants consitute the Milk Control Board created by Chapter 158 of New York Laws of 1933. They maintain a business office in the Southern District of New York.

4. This suit is brought to enjoin the defendants from enforcing against the plaintiff certain orders made by the defendants under alleged authority of the statute above

mentioned, upon the ground that such statute and also such orders confiscate plaintiff's property without due process of law and deprive plaintiff of the equal protection of the law, all in violation of the Fourteenth Amendment of the [fol. 78] Constitution of the United States.

5. Plaintiff is the owner of properties used in its milk business and valued at more than $450,000.00.

6. On or about June 22, 1933, there was duly issued to the plaintiff a license as a milk dealer pursuant to the statute above mentioned.

7. Under the aforesaid statute defendants are empowered to fix by order the maximum and minimum wholesale and retail prices to be charged and paid for milk handled within the State of New York for fluid consumption, and in the event that plaintiff offer to purchase or purchase or offer to sell or sell fluid milk at prices less than or more than the price fixed by defendants, the defendants are empowered to suspend or revoke the plaintiff's license to carry on the business of milk dealer.

8. Defendants have made orders dated December 29 and 30, 1933, whereby they determine that plaintiff has underpaid its producers for milk delivered during the months May to September, inclusive, of 1933, by a sum which agregates more than $23,000.00. By those orders defendants revoked the license of plaintiff as a milk dealer, but offered to reinstate it if plaintiff made up the alleged underpayments to its producers.

9. Under various orders of the defendants the minimum prices fixed for payment from milk dealers to producers for Class I milk (milk so marketed as to be used for fluid consumption) was approximately four cents a quart from May 16, 1933 to July 20, 1933, and approximately five cents a quart from July 21, 1933 to the commencement of this suit.

10. Under certain orders of the defendants, as affected by the "unadvertised" provision of the aforesaid statute, the minimum prices fixed for resales from the plaintiff and [fol. 79] other "unadvertised" milk dealers to stores and restaurants in New York City, for bottled Grade B milk, were eight cents a quart from May 16, 1933 to July 20, 1933,

and nine cents a quart from July 21, 1933 to the commencement of this suit.

11. The competition offered by other milk dealers in New York City prevented and prevents the plaintiff from selling milk at prices greater than the minimum price fixed by the defendants.

12. Plaintiff's costs for handling milk at country plants and processing and transporting it to the place and condition and resale in New York City to stores and restaurants was during the period from May 16, 1933 to the commencement of this suit, slightly in excess of four cents a quart.

13. The difference between the prices fixed by the defendants as the minimum prices which plaintiff must pay for milk purchased by it from producers, and the prices at which such milk could be sold whether in the form of Grade B milk or fluid cream, has at all times been and now is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation.

The foregoing findings of fact are stipulated on behalf of the plaintiff and the defendants to be unobjectionable for the purpose of adjudicating the motions now presented.

Dated March 19, 1934.

Rubinton & Coleman, Solicitors for Plaintiff. Henry S. Manley, Solicitor for Defendants.

[fols. 80 & 80a] The foregoing findings of fact hereby are approved this 27th day of March, 1934.

Learned Hand, United States Circuit Judge. Wm. Bondy, United States District Judge. Robert P. Patterson, United States District Judge.

[fols. 81 & 81a] In United States District Court

[Title omitted]

Conclusions of Law

1. Chapter 158 of New York Laws of 1933, so far as involved in this suit, is constitutional and valid.

2. No reason appears for holding the orders of the defendants, so far as involved in this suit, to be otherwise than constitutional and valid.

3. The order to show cause should be discharged and the complaint dismissed.

The foregoing conclusions of law hereby are approved this 27th day of March, 1934.

Learned Hand, United States Circuit Judge. Wm. Bondy, United States District Judge. Robert P. Patterson, United States District Judge.

[fol. 82] In United States District Court

Hegeman Farms Corporation, Plaintiff,

against

Charles H. Baldwin, Thomas Parran Jr., and Kenneth F. Fee as Members of the Milk Control Board of the State of New York, Defendants

Statement of Evidence and Proceedings, and Decree—
Filed, March 28, 1934

This cause came on to be heard on due notice at the Federal Building, New York City, on February 12, 1934, before Honorable Learned Hand, United States Circuit Judge, Honorable William Bondy, United States District Judge, and Honorable Robert P. Patterson, United States District Judge, sitting as prescribed by Section 380 of Title 28 of the United States Code.

Plaintiff appeared by Rubinton & Coleman, solicitors. Defendants appeared by Honorable John J. Bennett, Jr., Attorney General of New York State and by Henry S. Manley, solicitors, Defendants filed and served their answer.

The plaintiff offered as its proof, in addition to the bill of complaint, two affidavits verified by Benjamin Greenberg, one verified on January 26, 1934, and the other on February 12, 1934. Plaintiff moved upon the pleadings and proofs for a final decree granting to it the relief prayed for in the bill of complaint.

Defendants offered as their proof, in addition to the answer, an affidavit by Kenneth F. Fee and an affidavit by [fols. 82a & b] Laurance L. Clough, each verified on Feb-

ruary 8, 1934. Defendants moved upon the pleadings and proofs for a final decree dismissing the bill of complaint upon the merits.

The issues were argued by Samuel Rubinton for the plaintiff and by Henry S. Manley for the defendants. The Court took the respective motions of the parties under advisement, reserving decision thereon. Thereupon, due deliberation having been had, an opinion was filed by the Court on March 16, 1934, and it is ordered, adjudged and decreed as follows:

That the order to show cause why a temporary injunction should not be granted be and is hereby dismissed and the temporary injunction be and is hereby denied.

That the bill of complaint be and hereby is dismissed.

Dated this 27th day of March, 1934.

Learned Hand, United States Circuit Judge. Wm. Bondy, United States District Judge. Robert P. Patterson, United States District Judge.

[fols 83 & 83a] In United States District Court

[Title omitted]

Petition for Appeal and Assignment of Errors

To the District Court of the United States for the Southern District of New York State and to the Honorable Judges Thereof:

The above named plaintiff feels itself aggrieved by the final decree of this Court entered March 1934, in the office of the Clerk thereof, and respectfully prays an appeal therefrom to the Supreme Court of the United States.

The plaintiff hereby assigns as the errors on which it will rely on such appeal that the District Court erred in making each of its conclusions of law herein.

Plaintiff prays for a reversal of said decree, and that a transcript of the record, proceedings and papers on which said decree was made and entered may be transmitted forthwith, in duly authenticated form, to the Supreme Court of the United States.

Dated March 26, 1934.

Rubinton & Coleman, Solicitors for Plaintiff.

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 28, 1934

The plaintiff in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the decree made in said suit by the District Court and entered in the office of its Clerk on March —, 1934, and the plaintiff having presented and filed its petition for appeal, prayer for reversal and assignment of errors,

Now, on motion of Rubinton & Coleman, solicitors for plaintiff, it is

Ordered, that the appeal be, and the same hereby is, allowed in the above entitled cause as provided by law; and it is further

Ordered, that the Clerk of the District Court prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States so that it shall have the same within forty days from this date; and it is further

[fols. 85 & 85a] Ordered, that security for costs on said appeal be, and the same hereby is, dispensed with, by consent of solicitors for defendants.

Dated March 27, 1934.

Wm. Bondy, United States District Judge.

[fols. 86 & 86a] Citation in usual form omitted in printing.

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

WAIVER OF SECURITY FOR COSTS

Defendants hereby consent to the granting of an order allowing plaintiff to appeal herein without the necessity of filing any security for costs.

Dated March 27, 1934.

Henry S. Manley, Solicitor for Defendants.

[fol. 88] In United States District Court

[Title omitted]

Stipulation as to Transcript of Record

Solicitors for the respective parties hereby stipulate, pursuant to subdivision 2 of Rule 10 of the Supreme Court of the United States, that the following only shall be included in the certified transcript of record required to be transmitted to the Supreme Court of the United States:

1. Order to show cause dated January 30, 1934.
2. Bill of complaint, omitting exhibits A and C, but including exhibits B, D and E.
3. Affidavit of Benjamin Greenberg dated January 26, 1934, omitting exhibits I and II.
4. Answer.
5. Motion to dismiss.
6. Affidavit of Kenneth F. Fee dated February 8, 1934, including the order appended thereto.
7. Affidavit by Laurance L. Clough dated February 8, 1934.
8. Affidavit of Benjamin Greenberg dated February 12, 1934.
9. Opinion of the District Court.

[fol. 89] 10. Findings of fact.
11. Conclusions of law.
12. Statement of evidence and proceedings, and decree.
13. Petition for appeal and assignments of error.
14. Order allowing appeal.
15. Jurisdictional statement under paragraph 1 of Rule 12 of the Supreme Court of the United States.
16. Proof of service of jurisdictional statement.
17. This stipulation.

Dated March 23, 1934.

Rubinton & Coleman, Solicitors for Plaintiff. Henry S. Manley, Solicitor for Defendants.

So Ordered.

Wm. Bondy, U. S. D. J

[fol. 90] Citation, in usual form, showing service on Henry S. Manley omitted in printing.

[fol. 91] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated April 10, 1934.

Rubinton & Coleman, Solicitors for Plaintiff. Henry S. Manley, by Robert G. Blabey, Assistant Counsel and One of the Solicitors for Defendants.

[fol. 92] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 93] In Supreme Court of the United States

Statement of Points, etc.—Filed April 25, 1934

The appellant hereby adopts its assignment of errors as its statement of points to be relied upon, and represents that the whole of the record as filed is necessary for consideration of the case.

Rubinton & Coleman, Solicitors for Appellant.

Due service upon appellees of the foregoing statement of points, etc., hereby is admitted this — day of March, 1934, and appellees hereby designate the same parts of the record for consideration.

Henry S. Manley, Solicitor for Appellees.

[fol. 94] [File endorsement omitted.]

Endorsed on cover: File No. 38,591. S. New York, D. C. U. S. Term No. 27. Hegeman Farms Corporation, appellant, vs. Charles H. Baldwin, Thomas Parran, Jr., and Kenneth F. Fee, as Members of the Milk Control Board of the State of New York. Filed April 25, 1934. File No. 27 O. T., 1934.